

IN THE SUPERIOR COURT OF FULTON COUNTY  
FULTON JUDICIAL CIRCUIT  
STATE OF GEORGIA

FULTON COUNTY COALITION FOR	)	
	)	
GOOD GOVERNANCE, ET AL	)	
	)	
Plaintiffs	)	Case Number
	)	
Versus	)	2018-CV-313418
	)	
ROBYN CRITTENDEN, ET AL	)	
	)	
Defendants	)	

STATUS HEARING

A transcript of the proceedings before the **HONORABLE ADELE P. GRUBBS**, on December 5, 2018, at the Cobb County Courthouse, Marietta, Cobb County, Georgia.

**APPEARANCE OF COUNSEL:**

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## PROCEEDINGS

\* \* \* \*

3                   THE COURT: Fulton County Coalition for Good  
4                   Governance versus Robyn Crittenden. With due respect to  
5                   y'all, I need to kind of know who is who and who  
6                   represents who and so on and so forth. There's one face I  
7                   recognize. The rest of you I've never seen before. Good  
8                   morning Mr. Lindsey. Go ahead.

9 MR. BROWN: Judge, my name is Bruce Brown. I  
10 represent the Plaintiffs.

THE COURT: Okay. And are all the Plaintiffs here?

12 MR. BROWN: No, Your Honor. Two of the Plaintiffs  
13 are here, Rhonda Martin and Jeanne Dufort.

14 THE COURT: Okay.

15 MR. BROWN: And Marilyn Morris, who is the executive  
16 director of The Coalition is here at counsel's table. So  
17 three of the Plaintiffs are here.

18 THE COURT: Okay. Then let me ask about on the  
19 Defense side.

20 MR. BELINFANTE: Good morning, Judge, Special  
21 Assistant Attorney General representing Secretary of State  
22 Robyn Crittenden. I'm joined by my partner Vincent Russo  
23 and Alex Denton.

24 THE COURT: Okay. So just take a seat. Have you  
25 made an appearance of counsel? I don't have everything, I

1           don't think. I know this is really a Fulton County case  
2           and we probably need to be doing this in Fulton County  
3           from now on. This is more of a status, where are we,  
4           where are we headed type hearing this morning, so I'll get  
5           your names properly at some point. If I call you wrong,  
6           please excuse me.

7           MR. LINDSEY: Good morning, Your Honor.

8           THE COURT: Good morning.

9           MR. LINDSEY: My name is Edward Lindsey. I represent  
10          Lieutenant Governor Elect Geoff Duncan.

11          THE COURT: Who?

12          MR. LINDSEY: Geoff Duncan who's the Lieutenant  
13          Governor Elect.

14          THE COURT: Okay. Yes, sir.

15          MR. TYSON: Good morning, Your Honor. I'm Bryan  
16          Tyson, joined by Dick Carothers. We represent the  
17          Gwinnett County Board of Registrations and Elections.

18          THE COURT: Yes.

19          MR. WARE: Good morning, Judge Grubbs. David Ware  
20          for DeKalb County Board of Registration and Elections,  
21          along with Pearson Cunningham, Russell Britt, and Mr.  
22          Bryan.

23          THE COURT: All y'all four together?

24          MR. WARE: Yes, we're all together for DeKalb County.

25          THE COURT: Yes, ma'am.

1 MS. BURWELL: Kaye Burwell with Cheryl Ringer on  
2 behalf of Fulton County.

3 THE COURT: Okay. So each county is represented, and  
4 one of the candidates is represented. Okay, let me ask  
5 you, Mr. Brown. I know there's been some confusion  
6 because this was a recusal and I was told to take it. Is  
7 there service on everybody?

8 MR. BROWN: No, Your Honor. Should I stand at the  
9 podium?

10 THE COURT: Whichever makes you more comfortable.  
11 You will find that I'm a fairly -- Despite my reputation,  
12 I'm a fairly easy going kind of person as long as you're  
13 doing what you're supposed to do.

14 MR. BROWN: Thank you, Your Honor. The Plaintiffs  
15 have made every effort to effect service in accordance  
16 with the special provisions of the election contest  
17 statute. And what those provisions contemplate is that  
18 actually the clerk and the assigned Judge perfect the  
19 service.

20 THE COURT: Right.

21 MR. BROWN: And the necessary steps to that --

22 THE COURT: They sign the service.

23 MR. BROWN: Right. And so we tried it in Fulton  
24 County.

25 THE COURT: Fulton didn't work.

1                   MR. BROWN: It didn't work. And this is in the  
2 record but I alerted the clerk when I filed the petition  
3 that there were special provisions, both for the  
4 assignment of the Judge and for the special summons.

5                   THE COURT: Right.

6                   MR. BROWN: That didn't make it through the court  
7 system down there until finally the chief Judge took  
8 control of it and assigned -- and made arrangements for  
9 your assignment. And so one of the first things that I  
10 would ask is that the Court direct the clerk in Fulton  
11 County to issue the summons and to perfect service of the  
12 summons upon the Defendants. We have drafted -- With  
13 corrections from Judge Russell we have drafted the special  
14 statutory summons and so I would be able to transmit to  
15 your clerk or to your staff a Word copy of the summons  
16 that could be modified to include what Your Honor would  
17 specify as the answer date.

18                  THE COURT: Okay.

19                  MR. BROWN: One of the things that this law says is  
20 that it's not 30 days. It's what you say their answer  
21 date is.

22                  THE COURT: I have a book.

23                  MR. BROWN: So that would be one of the first things  
24 that you did.

25                  THE COURT: I knew I wouldn't have a computer so I

1                   brought the book.

2                   MR. BROWN: That would be one of the first things on  
3                   my list of things that would need to be covered would be  
4                   making sure that Your Honor has the paperwork necessary to  
5                   set this.

6                   THE COURT: And you think it's necessary to process  
7                   it through my clerk or do I process it through Fulton  
8                   County?

9                   MR. BROWN: Through Fulton County.

10                  THE COURT: Okay.

11                  MR. BROWN: So that would be the first thing we'd ask  
12                  for and we'd be happy to --

13                  THE COURT: And you've got that paperwork with you.

14                  MR. BROWN: I don't have it with me. It is with -- I  
15                  can have it tendered to you immediately.

16                  THE COURT: You can email it to me.

17                  MR. BROWN: Yes, ma'am.

18                  THE COURT: Any response to all that about the  
19                  service, from anybody? Has anybody actually been served?

20                  MR. RUSSO: The Secretary of State has not been  
21                  served.

22                  THE COURT: But y'all got here.

23                  MR. BELINFANTE: We're here special, Judge.

24                  THE COURT: Okay. So I'm going to do that. If  
25                  you'll get that to me. I'll give you a card. I'll find

1 one before we get through.

2 MR. BROWN: Thank you, Your Honor.

3 THE COURT: I'll get you an address to go to. What  
4 is next on your side, Mr. Brown?

5 MR. BROWN: Your Honor, the next thing on the agenda  
6 would be several things. First would be, if Your Honor is  
7 prepared to do so, to maybe anticipate a trial date.  
8 Second would be to discuss the necessary parties. And the  
9 third would be our request for emergency discovery so that  
10 the evidence, which could be vanishing now that the  
11 elections are done, is preserved and inspected for  
12 purposes of determining the causes of action.

13 THE COURT: Let me handle that backwards. Let me ask  
14 everybody else, okay. Do you have any objection to an  
15 order to preserve the evidence? I'm not -- I didn't say  
16 anything about inspect. I just said preserve.

17 MR. BELINFANTE: Your Honor, Josh Belinfante again,  
18 for Secretary Crittenden. And I should say -- I should  
19 have said in the beginning, we are appearing specially  
20 given the service issue.

21 THE COURT: I'm assuming everybody is appearing  
22 specially because there's no service.

23 MR. BELINFANTE: Yes, Your Honor. In terms of  
24 preserving the evidence, I think the problem here is that  
25 the allegations seem to indicate or seem to question

1           whether that's even possible. And so the position of the  
2           Secretary of State's Office is that there will be no  
3           destruction or willful destruction of the evidence. But I  
4           don't know that the Plaintiffs take the position that  
5           that's even feasible.

6           THE COURT: Let me rephrase it. That you will  
7           preserve the evidence as far as is possible.

8           MR. BELINFANTE: Yes, Your Honor.

9           THE COURT: I mean, I don't know -- I've read the  
10          pleadings. I don't know about all the technicalities and  
11          what's what.

12          MR. BELINFANTE: Right.

13          THE COURT: And we're all lawyers and not tech  
14          people. So I would think, Mr. Brown, an order that they  
15          preserve the evidence as far as is possible would be  
16          appropriate at this minute. I'm not inclined to go  
17          further than that, because there's been no service and I  
18          haven't seen any answers and they haven't had a right to  
19          challenge anything.

20          MR. BROWN: Yes, Your Honor.

21          THE COURT: Let me hear from each one in turn.

22          MR. TYSON: Yes, Your Honor. For Gwinnett, also, we  
23          wouldn't have a problem with that as far as possible.  
24          Obviously we have to use the machines. We had to use them  
25          yesterday.

1                   THE COURT: As far as possible. There's to be no  
2 destruction, deliberate destruction. What the machine  
3 does to itself, who knows.

4                   MR. TYSON: Right. So we have no objection, Your  
5 Honor.

6                   THE COURT: Okay.

7                   MR. WARE: On behalf of DeKalb, Your Honor, we will  
8 follow Your Honor's direction.

9                   THE COURT: No problem with DeKalb. Fulton?

10                  MS. RINGER: We, as well, will follow the order.

11                  THE COURT: Okay. Mr. Lindsey doesn't really have  
12 any.

13                  MR. LINDSEY: Given the fact, Your Honor, that we're  
14 not in possession of any of the documents.

15                  THE COURT: You're not in possession of anything.

16                  MR. LINDSEY: We simply want everyone to behave.

17                  THE COURT: I gotcha. Anybody I left out?

18                  (No response.)

19                  THE COURT: Okay. So if you'll do an order for me,  
20 Mr. Brown. Like I say, I'm going to give everybody my  
21 card when we're done. Unfortunately, Senior Judges are  
22 movable people that wander all over the world. Well, I  
23 don't go below McDonough but I've been to Ringgold. So  
24 finding us sometimes is an issue and I give you my  
25 personal email so that you can find me whenever you need

1                   me. So just get it to me.

2                   MR. BROWN: Your Honor, one point of clarification in  
3                   terms of as much as possible.

4                   THE COURT: Right.

5                   MR. BROWN: It is the Plaintiff's position that if  
6                   these machines are reused in subsequent elections, that  
7                   that will wipe the memory.

8                   THE COURT: Okay. We're going to move as fast as we  
9                   can move on this case. As I'm looking at it, somebody has  
10                  a MARTA election in March. I don't know which -- I don't  
11                  know whether that involves anybody in this case.

12                  MR. TYSON: Yes, that's Gwinnett County.

13                  THE COURT: That's Gwinnett. Okay. We'll have  
14                  handled this before we get to March.

15                  MR. BROWN: Thank you.

16                  THE COURT: Okay. So right now there isn't anything  
17                  else that I know of. There aren't any other elections.  
18                  If something comes up, let me know.

19                  MR. RUSSO: I think the City of Atlanta has one --

20                  THE COURT: Huh?

21                  MR. RUSSO: I think the City of Atlanta has one also  
22                  and I believe they use Fulton County's.

23                  THE COURT: When is it, do you know?

24                  MR. BELINFANTE: City Councilman Ivory Young.

25                  THE COURT: Oh, yes, that's right. Okay. We'll move

1 as fast as we can move.

2 MR. BROWN: Thank you, Your Honor. If it's okay with  
3 Your Honor, what we will put in the draft preservation  
4 order is that the Defendants will use other machines for  
5 these smaller elections.

6 THE COURT: No, I didn't say that.

7 MR. BROWN: Okay.

8 THE COURT: That's not what I said.

9 MR. BROWN: I understand, Your Honor.

10 THE COURT: I mean, you're asking me something. At  
11 this point I have no idea about the case.

12 MR. BROWN: I understand.

13 THE COURT: All I'm trying to do is maintain the  
14 status quo as well as I can while everybody gets served.  
15 Everybody has a right to file answers, motions, whatever  
16 may be coming at you. That's all I'm trying to do is  
17 preserve the status quo.

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: Okay. Now you mentioned something about  
20 parties?

21 MR. BROWN: Yes, Your Honor. The Secretary of State  
22 filed a Motion to Dismiss late last night, and the  
23 Secretary of State is taking the position that the  
24 Secretary of State is not a proper party to this.

25 THE COURT: Well I'm not going to rule on that. See,

1           that's one of the things I'm concerned about. I don't  
2           know what kind of motions are coming. I'm assuming --  
3           With due respect -- I don't know how many lawyers we have  
4           in this courtroom -- but they're not going to just roll  
5           over and play dead. They're going to be responsive. Is  
6           that a good word? Responsive, okay. So I want to give  
7           them the proper time to do that, and I'm not going to deal  
8           with anything -- Now if there's a -- I haven't seen it.  
9           If it came I'm -- My office is supposed to be served with  
10          it up here. As I say, I'll give everybody a card so you  
11          can -- You can send me copies direct of everything you've  
12          got. So if I'm somewhere else, I can still get copies of  
13          them and I can still print them and know what I'm looking  
14          at and line them up. But no, I'm not dealing with any of  
15          that.

16           MR. BROWN: Thank you, Your Honor.

17           THE COURT: Now, trial date. Having said there is a  
18          motion pending -- And we've got to have service. If you  
19          get me that order and I think I am required -- It's five  
20          to ten days after service as I understand what the code  
21          section says. So they have to do that. So you've got to  
22          get me the order. We're probably looking at after  
23          Christmas and it would seem to me that we could set it for  
24          what I would term motion hearings or whatever else they  
25          may file. And, of course, you may want to respond to some

1       of them, too. I understand all that. I think we just set  
2       it for a date. Getting y'all together, though you've done  
3       good today, can be somewhat difficult.

4           My suggestion would be either the 7th or the 9th of  
5 January. Would you look and see if somebody has something  
6 that would require -- I'm thinking one of those two days  
7 just to hear whatever may be filed. And at that point  
8 then we can set it down for trial. And we're looking at  
9 probably the first week in February for trial is what  
10 we're looking at. Let me give y'all a chance to talk  
11 about that and see where you are on those dates. Y'all  
12 take your time.

13 (Brief pause.)

14 MR. LINDSEY: Sorry about that, Your Honor.

15 | THE COURT: No, no. I want to --

16 MR. LINDSEY: It's actually fairly --

17 THE COURT: It's just, is that enough

18 y'all's position?

19 MR. BELINFANTE: The Defendants' collective position,  
20 Your Honor, is that, you know, there are statutory  
21 deadlines set in there and so once service is done that  
22 triggers one and triggers another. As long as we're not  
23 waiving any defenses based on those statutory timelines,  
24 we think that having motions due to the Court on or before  
25 December 20 would be appropriate. And then if the Court

1           wants to have a hearing on the 7th or the 9th, all parties  
2           -- at least all Defendants are available to do so. But we  
3           would want to have a hearing on the merits presuming the  
4           Court even chooses to do that or get that far, as soon as  
5           possible thereafter.

6           THE COURT: I understand that and I was looking at  
7           that. Say we did February the 7th for motions.

8           MR. BELINFANTE: January 7th, Your Honor?

9           THE COURT: January 7th for motions. We could do  
10          trial the 17th and 18th.

11          MR. BELINFANTE: Of?

12          THE COURT: January. So motions due by December  
13          20th, January the 7th will be motion hearings, and then  
14          trial will be -- And we can do it all in one order,  
15          because I think I'm required to do that. What did I say,  
16          17th and 18th of February? I've got to find -- Well we'll  
17          talk about that in a minute. Not February, of January.  
18          Trial would be January 17th. So motions hearings on the  
19          7th and trial on the 17th. Any problem with that, Mr.  
20          Brown?

21          MR. BROWN: No, Your Honor. If it's an open day for  
22          the Court and for the Defendants, for the Plaintiffs the  
23          9th would be marginally better for the initial hearing  
24          rather than the 7th; however, we will be here whenever  
25          we're ordered to do so, Your Honor.

1 THE COURT: Any issue with the 7th or the 9th?

2 MR. BELINFANTE: It does not appear to be, Your  
3 Honor.

4 THE COURT: Everybody all right? Okay. We'll say  
5 the motions are on the 9th. I've got to rule on them.  
6 That gives me time. Motions on the 9th, trial on the 17th  
7 and 18th. And I can do that order. I'll do that order.

8 MR. BELINFANTE: The only issue, Your Honor, I'm  
9 truly not trying to be difficult, but I just want to --

10 THE COURT: No, no.

11 MR. BELINFANTE: I don't want the Court to think that  
12 at some point we surprised it or anything of that nature.  
13 Depending on when service happens. The statute appears to  
14 indicate that there's about 20 days between the appearance  
15 that is filed and then the actual trial date. This may,  
16 again, depending on service, fall outside that. I just  
17 want to make clear for the record that we're not waiving  
18 any defenses based on those dates.

19 THE COURT: Right. And we're doing these days -- and  
20 I'll do an order on the days, just to protect on the  
21 different rules and regulations. We can move them. It  
22 doesn't say we can't move them. And we can move them.  
23 And if service doesn't get done -- He'll give me the  
24 service papers. We'll send them to the clerk. The clerk  
25 will send them to the sheriff. It's Christmas. I don't

1 know. But we'll just see where it goes. And I trust  
2 we'll have a return of service on each one so that we will  
3 not.

4 MR. BELINFANTE: Great. All right. Thank you,  
5 Judge.

6 THE COURT: Okay. The issue is this, and let me say  
7 this -- As I said, I go to Ringgold, so I go wherever I  
8 need to go. Do you want to hear it in Cobb or do you need  
9 to hear it in Fulton? Whatever is easier for y'all.

10 MR. BELINFANTE: On behalf of the secretary, we're  
11 indifferent. Whatever is easiest for the Court is easiest  
12 for us.

13 THE COURT: With due respect, when you come to Cobb  
14 in the morning you're going the opposite way with the  
15 traffic. I was trying to work out how to phrase that.  
16 And so it may be just that we can keep doing this in Cobb.  
17 If someone objects, I'll try and move it to Fulton.

18 MR. BROWN: No objection, Your Honor.

19 THE COURT: No objection. Nobody's objecting right  
20 now.

21 MR. LINDSEY: No objection, Your Honor.

22 THE COURT: No objection. So we'll do it in Cobb. I  
23 will try -- I will go right now and see which courtroom I  
24 can get to do it in. How many lawyers do we have? We  
25 have 16 lawyers. So we ought to get the big courtroom.

1 Let's see what I can do. And then, Madam Clerk, would you  
2 put these out? I hope there's enough. That's one for  
3 everybody. That's my contact information. It has my --  
4 That's for everybody. It has my cell phone number on it.  
5 It has everything that you need, because, as I say, we  
6 move around a lot. Anything else we need to do this  
7 morning?

8 (No response.)

9 THE COURT: We're done. If you get that service to  
10 me as fast as possible, I'll get it filed and done. I do  
11 have a law clerk. He's not here yet. And we'll get it  
12 done.

13 MR. BELINFANTE: Judge, just so I'm clear, whenever  
14 we filed something is it your preference that we also  
15 email you a copy of what we file?

16 THE COURT: Yes. Just email me a copy so I've got it  
17 and I can start looking at it and see where we are.

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: Thank you. Thank you, gentlemen.

20 (End of Proceedings).

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25

C E R T I F I C A T E

STATE OF GEORGIA )

COUNTY OF COBB )

6 I hereby certify that the foregoing transcript was taken  
7 down, as stated in the caption, and the questions and answers  
8 thereto were reduced to type-written form by me personally;  
9 that the foregoing pages 01 through 18 represent a true,  
10 correct and complete transcript of the evidence given upon said  
11 hearing; and I further certify that I am not of kin or counsel  
12 to the parties in the case, am not in the regular employ of  
13 counsel for any of the said parties, nor am I otherwise  
14 interested in the result of said case.

15 This the 23rd day of January, 2019.

16 The above certification is expressly withdrawn and denied  
17 upon the alteration, disassembly or photocopying of foregoing  
18 transcript, including exhibits, unless said alteration,  
19 disassembly or photocopying is done under the auspices of Paul  
20 D. Crowder, C.C.R., C.V.R., and the original signature and  
21 original seal is attached thereto.

22

23

24

25

Paul D. Crowder, C.C.R., C.V.R.

Certified Court Reporter, B-1579

**COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.**  
**Transcript of Hearing Proceedings on 01/09/2019**

1 IN THE SUPERIOR COURT OF FULTON COUNTY  
2 STATE OF GEORGIA Fulton County Superior Court  
\*\*\*EFILED\*\*\*TAW  
Date: 2/19/2019 12:00 AM  
3 Cathelene Robinson, Clerk

4 COALITION FOR GOOD . CIVIL ACTION  
GOVERNANCE, RHONDA J. . FILE NO.: 2018-CV-313418  
5

6 MARTIN, SMYTH DUVAL, and .  
JEANNE DUFORT, . Taken at:

7 Plaintiffs, . Superior Court of Cobb County

9 vs. . 70 Haynes Street

10 ROBYN A. CRITTENDEN, . Courtroom 2000

11 Secretary of State of . Marietta, Georgia 30090  
Georgia, et al. .

12

13 Defendants. .

14 . . . . .

15 TRANSCRIPT OF HEARING PROCEEDINGS  
16

17 WEDNESDAY, JANUARY 9, 2019

18 8:59 a.m. to 11:04 a.m.

19

20 STATE OF GEORGIA SENIOR JUDGE ADELE P. GRUBBS

21

22 REPORTED BY:

23

24 PRISCILLA GARCIA, COURT REPORTER

25 NOTARY PUBLIC, STATE OF GEORGIA

**COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.**  
**Transcript of Hearing Proceedings on 01/09/2019** Page 2

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**COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.**  
**Transcript of Hearing Proceedings on 01/09/2019** Page 3

1 CONTINUATION OF APPEARANCES:

2

Defendant's Counsel: Vincent R. Russo, Esquire

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**COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.**  
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1	I-N-D-E-X	
2	EXHIBITS:	DESCRIPTION
3	NONE	
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1 COBB COUNTY, GEORGIA

2 WEDNESDAY, January 9, 2018 - 8:59 p.m.

3

4 \* \* \* \* \*

5

6 THE COURT: On this case we have a request on Rule 22  
7 who is opposed to make -- that request. Is anybody --

8 MS. BURWELL: (inaudible)

9 THE COURT: This is on the case. This is on the  
10 Coalition case.

11 MS. BURWELL: Right.

12 THE COURT: Does anyone have any objection to the

13 Rule 22? -- the cameraman wants to record the  
14 proceedings.

15 MR. BELINFANTE: No, Your Honor.

16 MR. BROWN: No, Your Honor.

17 THE COURT: Everyone's saying no.

18 MR. RUSSO: No, Your Honor.

19 THE COURT: Okay. Then I will grant it. I find that

20 it is covered under Section -- Rule 22. I have an order  
21 confirming.

22 THE VIDEOGRAPHER: Thank you.

23 THE COURT: I've got the order in front of me. I've

24 got it.

25 THE VIDEOGRAPHER: Will they know downstairs?

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1           THE COURT: I'm sorry.

2           THE VIDEOGRAPHER: Will they know downstairs? If I  
3           don't have it signed, they won't let me go through

4           security. If I don't have a signed --

5           THE COURT: I just signed it.

6           THE VIDEOGRAPHER: Oh, okay.

7           THE COURT: Pinpoint the rules though. I need to

8           explain to you what the rules are. You can only record

9           when I'm in courtroom.

10          THE VIDEOGRAPHER: Okay.

11          THE COURT: Okay. You cannot record anything from  
12           counsel's table.

13          THE VIDEOGRAPHER: Okay.

14          THE COURT: Okay. Or any conversation they may have.

15          I don't think there are any witnesses. It's not that kind  
16           of hearing today, but we'll see. It's not -- yet and

17          we'll see. Don't record anything that they've got

18          privilege and all those kinds of things. So be very  
19           careful on that.

20          The rules say no bench conferences. I can't imagine  
21           me trying to hold a bench conference with these people.

22          But we'll -- all I'm doing -- okay. So, I will sign the  
23           order. When you say downstairs, what do you mean?

24          THE VIDEOGRAPHER: To get through security I have to  
25           have a signed form to get through.

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1           THE COURT: Okay.

2           THE BAILIFF: I'll take care of that, Judge.

3           THE COURT: Okay.

4           THE VIDEOGRAPHER: Thank you.

5           THE COURT: There you go. I don't -- I've got a

6         couple of them, okay. Jim, I'll let him handle it, okay.

7         Okay. So, we have a good record, this is the Coalition

8         for Good Governance and various individuals versus Robyn

9         Crittenden, Fulton County, and Gwinnett County.

10         Can you each, Counsel, introduce yourselves for the

11         record so I have a record of who's here? Yes, sir.

12         MR. BROWN: Your Honor, Bruce Brown for the

13         plaintiffs. With me at counsel table is Marilyn Marks,  
14           the executive director of plaintiff Coalition for Good

15         Governance.

16         THE COURT: I will allow that right now. We'll see

17         where we go. Yes, sir.

18         MR. RUSSO: Good morning, Your Honor. Vincent Russo  
19           for the Georgia Secretary of State.

20         MR. BELINFANTE: Josh Belinfante also for the  
21           Secretary of State, Your Honor.

22         THE COURT: Okay.

23         MR. TYSON: Good morning, Your Honor. Bryan Tyson

24         and with me is Dick Carruthers. We represent the Gwinnett  
25         Board of Registrations and Elections.

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1           THE COURT: Okay.

2           MR. LINDSEY: Good morning, Your Honor. Edward  
Lindsey on behalf of Lieutenant Governor-elect Geoff

3

4 Duncan.

5           THE COURT: Okay.

6           MS. BURWELL: Kaye Burwell here on behalf of Fulton  
County.

7

8           THE COURT: How did you get stuck with this?

9           MS. BURWELL: There too many lawyers there this  
10 morning, Your Honor.

11          THE COURT: We're trying to pretend you're not here.  
I gotcha. I got it. I know how that works, okay. That's

12

13 it. As I understand it, DeKalb County has been dismissed?  
MR. BROWN: That's correct, Your Honor.

14

15          THE COURT: In looking at -- we're here -- let me be  
clear on this. We're here on motions today. This is not  
16

17 evidentiary. Understand the statute of evidence has been  
18 supposedly filed, the report's picked it up. That's not  
relevant today. It's got nothing to do with today.

19

20          That's not what we're here about, okay. We're here  
for the four corners of the petition; that's all we're  
21

22 here about. So I need to be clear about that. I  
understand though, Mr. Brown, is that you have agreed that  
23

24 the Coalition is not a proper party as to the election  
25 contest; is that correct?

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1           MR. BROWN: That is correct, Your Honor. The  
2 Coalition is a party to the Federal 1983 claims, and the  
3 individual plaintiffs are the contestants in the election  
4 contest.

5           THE COURT: Okay. And then with that covered, in  
6 count 2 and count 3 are federal claims; is that correct?

7           MR. BROWN: That's correct, Your Honor.

8           THE COURT: Okay. Are those not being contested in  
9 federal court right now?

10          MR. BROWN: No, Your Honor. They're -- similar  
11 claims have been raised in federal court, but these are --  
12 these claims are also raised in this case.

13          THE COURT: Well, how many times can you raise the  
14 same claim? I mean, if this is a federal -- I'm going to  
15 hear from everybody. If this is a federal issue, then why  
16 don't I just stay it and let the federals decide what it  
17 is?

18          MR. BROWN: Your Honor, the plaintiff's claims are  
19 right to be asserted here, and it may be that they -- that  
20 those --

21          THE COURT: You can't keep asserting them in all  
22 different kinds of -- of courtrooms.

23          MR. BROWN: That's correct, Your Honor. But had --  
24 had the plaintiffs not asserted them, they could have  
25 waived their right to the relief, if that relief were

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1       deemed right before the other ones matured. The federal  
2       court --

3                     THE COURT: Let me hear from here from the -- from  
4       the defendants on that issue. Don't mean to -- if I'm  
5       making any sense this morning.  
6

7                     MR. RUSSO: Good morning, Your Honor. Vincent Russo  
8       for the Secretary of State. This -- these are claims that  
9

10      are pending and the case before Judge Totenberg in a  
11     criminal matter. We don't have any objection to you also  
12     considering those claims. We will do as you determine.

13                     THE COURT: Okay.

14                     MR. DENTON: And Your Honor, for Gwinnett, we're kind  
15     of in the same position as Secretary of State.

16                     THE COURT: Okay.

17                     MR. DENTON: We're in the same position as the  
18     Secretary of State's Office, and we don't have necessarily  
19

20     an objection. We don't think we're really proper to be  
21     part of the federal constitutional claims --

22                     THE COURT: (inaudible)

23                     MR. DENTON: -- so we can deal with that later. Yes.

24                     THE COURT: We'll take one step at a time.

25                     MR. DENTON: Yes.

26                     THE COURT: I'm trying to take -- this is today,

27     okay. I'm trying to take it one step at a time, okay.

28     I'm fairly simplistic about -- I'm a math major, okay.

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1 Explain life to me. You know, we're going to do it like  
2 that. I do better if I keep my brain in one spot at a  
time. Fulton County, what do you say?  
3

4 MS. BURWELL: Your Honor, on behalf of Fulton County,  
we take the position that the federal claims are pending  
5

6 in federal court, and this is just another opportunity for  
these same plaintiffs to bring the same claim again, and  
7

8 we agree with the Court that you want to stay the federal  
9 issues, the constitutional issues they claim that they're  
10 raising.

11 THE COURT: Mr. Lindsey.

12 MR. LINDSEY: Your Honor, I don't believe that Geoff

13 Duncan is really a party to the second and third count.  
They're simply a party in regard to the first count,  
14

15 seeking a new election.

16 THE COURT: Is it -- I'm sorry?

17 MR. LINDSEY: We're simply a party in regard to the  
18 first count, seeking a new election.

19 THE COURT: Right. But you're not really involved  
20 in --

21 MR. LINDSEY: It certainly does, however, make sense  
22 for you to stay.

23 THE COURT: You're right.

24 MR. LINDSEY: That'll do it.

25 THE COURT: Okay. Then I will hear the motions this

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1 morning on that, but I'm still not convinced I'm going to  
2 stay, okay. Because it's pending somewhere else. With  
3 that said, then let's go -- let me see. I'll hear -- let  
4 me hear the Secretary of State's motions first, okay.  
5 Let -- what we're going to do -- a lot of them -- a  
6 lot of them are the same. A lot of the motions are the  
7 same, so I'm going to -- I'm going to let you go first,  
8 and then we'll go from there, okay.

9 MR. BROWN: Thank you, Your Honor. And the  
10 defendant's counsel, we did try to split up kind of all  
11 arguments so that you aren't hearing --  
12 THE COURT: Whatever you want to do, Mr. Brown.

13 MR. RUSSO: We're here on Secretary of State's motion  
14 to dismiss, along with the motions to dismiss filed by our  
15 co-defendants. As you're aware, plaintiffs filed a  
16 petition contesting the results of the November 6, 2018,  
17 general election and the race for lieutenant governor for  
18 the State of Georgia.

19 In that election the margin of victory was 123,172  
20 votes. The plaintiffs in this case claim that the only  
21 explanations for the difference in the number of votes in  
22 the lieutenant governor's race and other statewide races  
23 is that there were malfunctioning or erroneously  
24 programmed voting machines or malicious manipulation of  
25 the voting machines.

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1       That that -- that those issues place in doubt the  
2       results of the election. Now plaintiff's, of course,  
3       completely disregard other reasonable explanations for the  
4       differences in the votes, such as the fact that there were  
5       third-party candidates in the other races and incumbents,  
6       but that's for another day.

7                  The Supreme Court has repeatedly stated that Georgia  
8       law prohibits a contestant from merely speculating or  
9       guessing as to the cause of an election contest. Here we  
10      have -- the plaintiffs have asserted grounds under 2125 --  
11      excuse me, 2102 520, under multiple different sections of  
12      the election page, excuse me.

13                 And the motion to dismiss, their response to the  
14      motion to dismiss has them discuss -- the plaintiffs have  
15      expanded the grounds for their contest to -- to additional  
16      ones. So, there are threshold issues that pertain to our  
17      client, which I'll address first.

18                 My partner, Josh Belinfante, will address the federal  
19      constitutional claims, and as I mentioned the other  
20      parties will address those claims. Your Honor, has  
21      already taken and confirmed the first step here that the  
22      Coalition for Good Governance lacks standing to file an  
23      election contest claim, so we're going to move past --  
24      past that.

25                 As Your Honor knows, election contests are authorized

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1 and governed by the Georgia Election Code, which is in  
2 Chapter 2 of Title 21. Pursuant to OCGA212520, there are  
3 only certain individuals who can be a defendant in an  
4 election contest and none of those individuals in -- in  
5 this context would be the Secretary of State, which is the  
6 first reason for dismissing the Secretary of State in the  
7 election contest.

8 THE COURT: Okay. I didn't -- Josh, I didn't realize  
9 you had to go back to the courtroom.

10 THE VIDEOGRAPHER: Yes.

11 THE COURT: Okay.  
12 THE VIDEOGRAPHER: (inaudible)

13 THE COURT: I didn't realize that they wouldn't let  
14 you go through. Let me give you a chance to get set up  
15 because that was not -- I didn't realize that.  
16 THE VIDEOGRAPHER: I'm good.

17 THE COURT: It gets confusing because everybody has a  
18 right to be heard, and I didn't realize they wouldn't let  
19 you bring it in, okay. But the fact that she -- that your  
20 allegation is the Secretary of State should not be a  
21 defendant, let me hear that. That doesn't apply to

22 anybody else. Let me hear that one first.  
23 MR. RUSSO: Yes, ma'am.

24 THE COURT: I understand it's a motion to dismiss,  
25 but it's an issue that's out in front. Go ahead.

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1           MR. RUSSO: Of course. Under OCGA212520,  
2        subsection 2, a defendant is defined as -- as four  
3        different specific classes. A defendant could be either  
4        the person whose nomination election is contested such as  
5        the lieutenant governor elect in this case, the person  
6        whose eligibility to seek any nomination or office in a  
7        runoff primary or election is contested, the election  
8        superintendent or superintendents who conducted the  
9        contested primary or election, or the public officer who  
10      formally declared the number of votes for and against a  
11      ballot question submitted to the electors at an election.  
12           Under the Georgia Election Code, the Secretary of  
13      State is not an election superintendent. Secretary of  
14      State does not conduct elections. Elections are conducted  
15      in the State of Georgia by -- at the county level, by the  
16      county superintendents.

17           Under the definitions, the general definitions that  
18      are applicable to the Georgia Election Code, a  
19      superintendent is specifically defined in 2122, 2,  
20      subsection 35, as either a judge of the probate court of a  
21      county or the County Board of Elections, the County Board  
22      of Elections and Registration, the joint City and County  
23      Board of Elections, or the joint City Board of Elections  
24      and Registrations, if a county has one.

25           And there are -- there are three other categories,

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1 which apply to municipal elections. None of those are  
2 applicable here. As Your -- as Your Honor can tell here,  
3 you know, the plain language in the definition does not  
4 include the Secretary of State, and -- and -- and that  
5 really goes to the fact that the Secretary of State,  
6 again, doesn't conduct elections.

7 Where the Secretary of State -- the Secretary of  
8 State is obviously involved in voter registration and must  
9 maintain a statewide voter registration database, but that  
10 doesn't make the Secretary of State a superintendent. The  
11 county -- the -- the plaintiffs have alleged that or have  
12 argued that, you know, since it's a statewide election  
13 involving a lieutenant governor, that the Secretary of  
14 State must -- must be a proper -- must be a superintendent  
15 and must be a proper party.

16 The defendant -- or excuse me, the plaintiffs rely on  
17 the case Mead vs. Sheffield, which involved a court of  
18 appeals election contest, and in that case the -- in that  
19 case, it was a 2004 election contest in which one of the  
20 -- the contestant missed the runoff by about 380 votes,  
21 because he had -- there was the wrong -- and there was a  
22 wrong name on the ballot.

23 We do not know why the Secretary of State in that  
24 case was a party. The plaintiffs claim that since she was  
25 a party in that case, she -- the -- current Secretary of

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1 State must, you know, must be a party in this case.

2 Of course, there's -- there's no precedent --  
precedential value in that case on that precise point.

3

4 That said, what the Mead vs. Sheffield case does highlight  
is that even in an election contest involving a statewide

5

6 race, election contest is filed against the county  
superintendents, which it was Laurens County in that case,

7

8 where there alleged irregularities that occurred in that  
9 particular county.

10 And that, you know, indicates where there is an  
11 alleged irregularity involving an -- an illegal ballot as  
opposed to an illegal vote, the contestant must show that

12

13 the number of illegal ballots cast exceeds the margin of  
victory in order to prevail.

14

15 Again, this is -- the -- the reason the case was  
filed in Laurens County -- against Laurens County was

16

17 because that's where the irregularities occurred. I know  
18 my colleagues at the -- that represent the other  
defendants, the county defendants will probably be

19

20 speaking to this issue, but Mead vs. Sheffield is clearly  
inapplicable here.

21

22 Plaintiffs also argue that the definition of election  
superintendent in the Recall Act of 1989, which is

23

24 Chapter 4 of Title 21, must apply to the Election Code.

25 Your Honor, I mean, it's a fundamental rule of

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1 statutory construction that it's -- it's presumed that the  
2 legislature acts intentionally and purposefully when it  
3 includes particular language in one section of a statute  
4 but omits it from another. And that's Tolson v. Sistrunk,  
332-Georgia at 324 from 2015.  
5

6 Now in this rule of statutory construction is applied  
7 to the present case, it's clear that the word

8 "superintendent" as used for purposes of election contest  
9 is -- is -- is referring to County Boards of Elections and  
10 Registration or county probate judges, and that's for  
11 counties that don't have, of course, a Board of  
12 Registrations and Elections.  
13

14 Finally, Your Honor, the plaintiffs have made an  
15 argument about -- that -- that a public officer who --  
16 that -- that the fourth subsection to the definition of  
17 "defendant" that discusses, you know, that a defendant can  
18 be a public officer who declares the number of votes for  
19 and against a question, submitted to -- submitted to the  
20 electors in an election that that somehow must wrap in the  
21 Secretary of State also, but, Your Honor, of course, a  
22 question -- the question is defined to be, you know,  
23 constitutional amendments or propositions, ballot  
24 referendum items that -- that voters vote on this, that  
25 has nothing to do with election contests involving  
candidates for public office.

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1        And we would say that there's -- there's no basis for  
2        making that -- that leap that the plaintiffs are -- are  
3        asking the Court to make. As Your Honor knows, election  
4        laws that are in variegation to common law must be  
5        strictly construed here.

6        There's -- there's no basis for expanding the  
7        definition of "superintendent" to somehow wrap the  
8        Secretary of State up into this election contest. The  
9        proper defendants would be the counties, the county  
10       superintendents in each county where the plaintiffs are  
11       aware of election irregularities.

12       Now that moves to the next -- the next issue, and as  
13       Your Honor pointed -- stated --  
14       THE COURT: (inaudible)

15       MR. RUSSO: Well, within the four corners of -- of  
16       the complaint or the -- the petition.

17       THE COURT: Let me take the one issue, okay. Are you  
18       arguing the motion to dismiss now?

19       MR. RUSSO: I'm still arguing the motion to dismiss,  
20       just moving past whether --  
21       THE COURT: That's not relevant here.

22       MR. RUSSO: Oh, I'm sorry. I apologize.  
23       THE COURT: No, -- go ahead.

24       MR. RUSSO: Okay. The plaintiff's election contest  
25       is also subject to dismissal for failing to meet the --

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1 the pleading requirements.

2 THE COURT: Okay. That I'd like to take separately.  
3 MR. RUSSO: Okay.

4 THE COURT: Let's take each step. That's what I said  
5 in the beginning.

6 MR. RUSSO: Okay.

7 THE COURT: Let's take each step. You'll get to

8 argue that.

9 MR. RUSSO: No, I understand. I -- I thought you  
10 meant each step -- I got you.

11 THE COURT: Let's -- the first issue before me is, is  
12 the Secretary of State a proper -- okay.

13 MR. RUSSO: Sure.

14 THE COURT: All right. Anybody else on the defense

15 might want to bring a -- how about you, Mr. Brown?

16 MR. BROWN: Thank you, Judge. Bruce Brown for the

17 plaintiffs. The issue of whether the Secretary of State

18 is a proper defendant is actually -- it touches upon two  
19 arguments that they make that are virtually the same. The

20 first is whether the Secretary is a proper defendant and  
21 second whether the Secretary has sovereign immunity.

22 If the Secretary of State is a proper defendant, then  
23 the sovereign immunity has been waived. The -- the

24 plaintiff's argument with respect to both issues is that  
25 the election statute says defendant means election

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1 superintendent. That is OCGA212250. The code then  
2 defines election superintendent.

THE COURT: Are you saying 212250? 520.

3

4 MR. BROWN: I'm -- I'm sorry. 520.

5 THE COURT: 520. So y'all know, I have the book. I

6 don't necessarily have access to this particular computer,  
and so I -- bring this book down with me.

7

8 MR. BROWN: I apologize, Your Honor.

9 THE COURT: It's 220?

10 MR. BROWN: 220. I keep transposing those numbers.

11 THE COURT: Yeah. Don't confuse them.

12 MR. BROWN: And then the phrase "election

13 superintendent" means in a statewide election the  
Secretary of State. That is defined in OCGA2143. Now, it

14

15 is correct that that definition of "election  
superintendent" as the Secretary of State is in a

16

17 different chapter of the code.

18 However, there's no reason to believe that the  
legislature, in using the term election superintendent in

19

20 the contest chapter, meant anything different and, in  
fact, commonsense would require that in a statewide

21

22 election that the proper defendant who is conducting the  
election is the Secretary of State.

23

24 Particularly when the irregularity that is alleged is  
25 an irregularity that is statewide in every single case.

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1 Now the defendants, the Secretary of State option for

2 Your Honor, is to rule that in the statewide election  
3 contest that the plaintiff must join 159 counties, and

4 so --

5 THE COURT: Well, we haven't gotten to that yet,

6 either.

7 MR. BROWN: But this is -- but, Your Honor, it's the

8 same -- I would -- it's the same argument in that -- the

9 -- they're saying that they are not proper, but instead

10 the proper defendants are the 159 counties.

11 And we -- we think that's absurd and that's not what  
12 the legislator -- legislature intended. And it's not what

13 the legislature said.

14 Moreover, Your Honor, there has been, as far as we

15 know, only one statewide election contest on record, and  
16 that is the Mead vs. Sheffield case, which Mr. Russo

17 discussed. And in fact, in the Mead vs. Sheffield case

18 the attorney general defended and did not raise the  
19 sovereign immunity argument at all, and it's a

20 jurisdictional argument and it made it to the Supreme  
21 Court.

22 And it was clear to the Secretary of State and the  
23 attorney general at the time, Your Honor, that our reading

24 of the statute and commonsense meant, of course, that the

25 Secretary of State who is in charge of the elections is

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1 the proper defendant in the statewide election contest.

2 Now, Mr. Russo said something to the effect, well,  
3 that was several years ago. I'm not sure why the

4 Secretary -- Secretary of State did it then, or why the  
5 former Secretary of State and former attorney general took

6 that position. I would like -- if I may approach, I found  
7 a case yesterday, Your Honor, which I believe is

8 instructed. But I'd like to approach the bench with a  
9 copy of some of the papers, if I might.

10 THE COURT: All right. If you want to -- we don't  
11 have a clerk because this is a Fulton County case. Thank  
12 you. So, it's just a brief?

13 MR. BROWN: It's a brief and then the case is  
14 attached to it, Your Honor.

15 THE COURT: I'm not going to -- I'm not going to take  
16 somebody else's brief. You want to argue it, fine, but

17 I'm not going to -- somebody else's brief and somebody  
18 else's case is not -- and has got nothing to do with that.

19 MR. BROWN: Fair enough. If the -- the case, which

20 follows the copy of the brief, is a case called Dawkins-  
21 Haigler vs. Anderson. It's reported at 301-Georgia-27.

22 In that case, the Secretary of State was sued. And I  
23 quote, it's "Brian Kemp in his official capacity as state

24 election supervisor." That was the capacity in which he  
25 was sued.

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1           The -- the case was defended by Chris Carr, attorney  
2 general, Dennis Dunn, Willard Chris Corea, the same  
3 attorney general law department lawyers who were defending  
4 this case along with outside counsel from the Robbins  
5 firm. This is a case that was -- was tried last year,  
6 Your Honor, and in that case the Secretary of State was --  
7           THE COURT: Has there been an appellate decision on  
8 the case?

9           MR. BROWN: Yes.

10          THE COURT: Okay.

11          MR. BROWN: It is 301-Georgia-27, and in that case  
12 the Secretary of State was sued quote "in its official  
13 capacity as state election supervisor," and that styling  
14 of the Secretary of State appears in his own brief, which  
15 is what I had shown to you, but the important thing is the  
16 reported decision, and in that case also the Secretary of  
17 State stood up and defended the case on the merits.

18          THE COURT: Okay. If you want to give me -- but you  
19 know, if you've got a decision, let me have the final  
20 decision, but what somebody else may have said and it's on  
21 the report, it's not relevant --

22          MR. BROWN: Your Honor the -- what the law department  
23 -- the position the law department said it is not binding  
24 either on the law department or anybody else. They can  
25 change their mind, of course, and not binding on Your

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1 Honor.

2 However, it is reflective of what the law is, and the  
3 law says that defendant means election superintendent and

4 the law says "election superintendent" in a statewide race  
5 means the Secretary of State. So, our argument is that

6 the statute is clear.

7 There is no case in the history in the State of

8 Georgia holding that the Secretary of State has sovereign  
9 immunity in an elections case. No case at all. They are  
10 asking Your Honor to make a precedent setting, a brand-new  
11 decision. It will be the first ever that ever granted  
12 this -- this relief.

13 THE COURT: If that's meant to intimidate me, it  
14 doesn't.

15 MR. BROWN: I don't think it should -- should  
16 intimidate you, Your Honor.

17 THE COURT: Well, you -- I've read a lot of what  
18 you've provided me. I have not read the proffer of  
19 evidence because it's not relevant today --

20 MR. BROWN: I understand.

21 THE COURT: -- and I understand where you're coming  
22 from.

23 MR. BROWN: Okay. Thank you, Your Honor. That's our  
24 argument on the sovereign immunity and the Secretary of  
25 State being a proper defendant.

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1           THE COURT: Okay. Any responses on that issue?

2           MR. RUSSO: Briefly, Your Honor. As you rightly  
3           noted these cases, this -- this brief and the cases cited

4           by plaintiff's counsel have no precedential value and  
5           basically stand for nothing on this -- on this point.

6           Plaintiff's counsel stated that the law says that in  
7           a statewide case, the superintendent is the Secretary of

8           State. Your Honor, I can't find anything on the books or  
9           in the code that -- that says such.

10          Even Chapter 4, even the Recall Act that plaintiff's  
11         counsel has referred to multiple times, states that in any  
12         case of elected state officers the Secretary of State --

13         and in short, you know, if somebody wants to challenge --  
14         if there's a group that wants to recall a public officer

15         or state officer, they have to go get a petition signed.  
16           And that petition then goes to the Secretary of

17         State. It's similar to a third-party candidate or an  
18         independent candidate trying to get on the ballot in a  
19         statewide race. None of this -- the Recall Act, of

20         course, has nothing to do with election contests, similar  
21         to independent candidates trying to file in a petition to

22         get on the ballot has nothing to do with election  
23         contests.

24          Your Honor, again, we don't know why or -- or if this  
25         issue has -- was raised in -- in the 2004 case. However,

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1 you know, the Secretary of State is not a statewide  
2 election superintendent. Georgia law has long held that  
3 elections are -- are conducted at the county level and if  
4 a contest is going to be filed, then it should be filed  
5 against the counties where those irregularities occurred.  
6

7 And so again, we would ask you to dismiss the  
8 election contest on -- on that basis.  
9

10 THE COURT: Okay. This goes to count 1 as I  
11 understand it, and 2125 -- this is Section 2 of 21, which  
12 is the election contest, okay, it -- it states that the  
13 election superintendent was superintendent to conduct a  
14 contested -- or election, okay. What it says, in 2- --  
15 again, this is within the same code, 212235 defines who  
16 those are.  
17

18 It defines who the superintendents are, and it does  
19 not include Secretary of State. That's the law, and  
20 definitions applicable to Section 2, okay. Now there may  
21 be in the recall, which is Section 4, that that may be  
22 different, but it's under a different code section. It's  
23 under a different section of the code. So as far as the  
24 election contest goes, count 1, I find the Secretary of  
25 State is not a proper party, okay. And so, I'll grant  
your motion. -- I'll put my, you know, -- as to count 1,  
okay.

MR. RUSSO: Yes, ma'am. Thank you,

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1           THE COURT: Okay. What's the next question?

2           MR. RUSSO: I think some of my other motions are  
mooted at this point, so do you want to --

3

4           MR. BROWN: Your Honor, it would be best at this  
point for Gwinnett County to make its proper party

5

6 argument or would you rather hear from the Secretary of  
State on the constitutional claims, counts 2 and 3?

7

8           THE COURT: Well, you've got a motion to dismiss on  
9 -- what, just on the general --

10          MR. RUSSO: Well, we have one every --

11          THE COURT: You just got a routine motion to dismiss  
on the four corners of the petition.

12

13          MR. RUSSO: That's right. We just had -- had other  
reasons why it should be dismissed.

14

15          THE COURT: I guess, Mr. Brown -- I guess I'd hear  
from Gwinnett first as to whether they should be a party  
16

17 and then Fulton whether they should be a party. And then  
18 we'll go into the -- if that's all right with you.

19          MR. BROWN: Thank you, Your Honor.

20

21          THE COURT: Okay. Okay --

22          MR. TYSON: Thank you, Your Honor. Good morning.

23

24          Bryan Tyson for Gwinnett County Board of Registrations and  
Elections.

25

26          For our motion to dismiss, Your Honor, I think if we  
determined now, if we've determined that the Secretary of

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1 State is not a proper party to an election contest, I  
2 think the logical questions is, well, who then is a proper  
3 party?

4 For -- for us as Gwinnett County, there is no  
5 question that the Gwinnett Board is an election  
6 superintendent who conducted the contested election. So,  
7 there's no issue there. The challenge in this scenario is  
8 that the plaintiffs have not sued all the parties that are  
9 required to afford them full relief and Mr. Russo  
10 referenced the Mead case where the case was filed against  
11 the county's where the problem was alleged in a statewide  
12 election contest.

13 And if you look at and kind of do a comparison  
14 between 520 and 522, I think it helps explain a little bit  
15 about how there's a connection between the grounds of the  
16 contest and who the defendant is in those cases. So,  
17 under the -- under 520-2A and B, you have a candidate  
18 who's the defendant -- the person who was nominated, the  
19 person whose eligibility is challenged.

20 That lines up to 522-2 where the allegation in the  
21 election contest is that the defendant, the candidate is  
22 not eligible to hold the office. And so, in those cases  
23 where you're challenging eligibility, the other candidate  
24 is obviously a logical defendant.

25 For 3, the election superintendent in 520 who

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1 conducted the contested primary, that's where you have the  
2 allegations on the grounds related to misconduct, related  
3 to illegal votes being cast or legal votes being rejected  
4 or errors in counting.

5 And in this case the plaintiffs have made a number of  
6 allegations about the various problems across the state,  
7 but they've only sued now Fulton and Gwinnett counties, as  
8 is evidenced by other motions they filed, they want to  
9 preserve evidence in Murray and Gordon counties.

10 There are allegations regarding DeKalb, regarding  
11 Worth County, regarding a variety of other Georgia  
12 counties that are not parties to this case. And the  
13 challenge in this situation is they have the evidence that  
14 Your Honor needs to be able to figure out is this a valid  
15 contest or not.

16 If this is not a scenario where you can just pick a  
17 county and then make allegations regarding and number of  
18 other counties when they're not parties to the case and  
19 can't get -- get in front of the court.

20 The -- in addition, there is a lack of allegations  
21 regarding Gwinnett County as to some of the specifics. A  
22 lot of the specific allegations involve other counties,  
23 many of whom are not parties. The other counties are the  
24 ones that have the evidence.

25 So, for our position as Gwinnett, we believe this is

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1 the basis for dismissal, because not only did plaintiffs  
2 fail to name the proper parties to start with, but it's  
now too late for them to amend.  
3

4 And while the election contest procedures clearly  
allow amendment of the petition, there's a difference when  
5

6 you're amending to add additional parties. And the only  
the Supreme Court case en pointe here is Brody vs.  
7

8 Champion. And in that case the -- the contestant had  
9 filed the case against the director of elections for  
10 DeKalb County, but had not sued the Board of Elections.

11 And the Supreme Court said, yes, you can modify, they  
were on notice within the statute; that's not a problem.  
12

13 The Hanson case that the plaintiffs have cited involved a  
different procedure under a municipal election code that  
14

15 involve a direct appeal or an independent lawsuit.

It's not really relevant here. What is relevant is  
16

17 we are now beyond the five-day statute or well beyond  
18 that. And the relation back under 9/11/15, there's  
nothing that the plaintiffs needed to know at the time  
19

20 they filed their lawsuit where they couldn't have named  
the counties that are going to have evidence that they  
21

22 claim they need.

In their petition they identify. These are the same  
23

24 counties are the worst -- have the worst questions about  
25 these percentages. They had anecdotes from counties that

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1 were not included as parties in the case. So now because  
2 we're too late to be able to do an amendment and add --  
3 and have that relate back to the original filling date,  
4 the statute has run as to those counties.

5 It is our position that those are necessary parties  
6 in order to give full relief in this case. And because  
7 those parties were not joined, that's a basis for a  
8 dismissal of the entirety of the election contest, as to  
9 those allegations that have been made by the plaintiffs.

10 THE COURT: Anybody else on the defendants' side that  
11 want to support that position? And pardon me -- argument  
12 at the same time.

13 MS. BURWELL: Kaye Burwell on behalf of Fulton  
14 County. We join in that argument, Your Honor, and we  
15 would add that when the Court looks at the complaint in  
16 Paragraph 38, it references that there were thousands of  
17 problems they alleged with the DRE machines where clearly  
18 Gwinnett and Fulton County aren't in a position to speak  
19 to those thousands of problems.

20 The only issues we could speak to would be any issues  
21 they alleged on our particular counties. And since this  
22 is a statewide issue, they're alleging the only way they  
23 would be able to bring information to the Court and the  
24 only way the Court would be able to have a full and fair  
25 hearing is if all those other counties that they're

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1 complaining about, where they allege all these issues  
2 occurred, were to be able to come in.  
3 And as we noted on our motion to dismiss, Your Honor,  
4 the Fulton County Board of Registrations and Elections  
5 can't provide the petitioners with the relief they seek  
6 because the DRE is constrained to follow state law. And  
7 they have to use the DRE machines because that's what  
8 state law requires.

9 And the only response the plaintiffs provided to  
10 that, Your Honor, was that absentee ballots could be used,  
11 but clearly the DRE doesn't have the ability to force  
12 every Fulton County voter to use an absentee ballot. The  
13 voters get to decide how they choose to vote.  
14 THE COURT: You're off the -- you're off the --  
15 you're off the field. So right now, so they join all the  
16 counties, or shouldn't they?

17 MS. BURWELL: They should have joined all of the  
18 counties, Your Honor.  
19 THE COURT: That's the issue we're figuring with them  
20 on this motion.

21 MS. BURWELL: Okay.

22 THE COURT: I'm trying -- I'm trying to do as clean a  
23 record as I can.

24 MS. BURWELL: Okay.

25 THE COURT: Okay. So, you'll be heard on that.

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1     Everybody's going to get heard on everything, okay.

2           MS. BURWELL: Okay.

3           THE COURT: I don't want to make you -- I'm just  
3

4     trying to make a nice, clean record of the -- of the case.

5           MS. BURWELL: Yes.

6           THE COURT: Okay. So, you -- you -- you agree that  
7     they have joined -- they should have seen everybody.

8           MS. BURWELL: Yes.

9           THE COURT: Okay? Every county, okay. Anybody else?  
10      No? Okay. Then you can, because you didn't find the  
11     word --

12           MR. BROWN: (inaudible)

13           THE COURT: (inaudible)  
14           MR. BROWN: Thank you, Your Honor. The Fulton

15     County's argument points to sort of the overall issue of  
16     how the plaintiffs are getting whip shot here. Fulton

17     says, we can't defend this because the Secretary of State  
18     does everything.

19           THE COURT: No. Don't go there. The issue we're  
20     dealing with, the only issue I'm trying to read right this  
21     minute is, should you have joined 159 counties or not?

22           MR. BROWN: No, Your Honor, and here's why.

23           THE COURT: Okay. That -- that's the issue.

24           MR. BROWN: We -- we have -- first, we have alleged  
25     causes of action against Gwinnett and Fulton. Our

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1 allegations cover -- they are proper defendants as they --

2 I think, believe as they have conceded, that they've --  
3 they conducted the election.

4 And we have alleged that the irregularities occurred  
5 in their counties, and they occurred in every county. And

6 so, Fulton and Gwinnett are proper defendants, and so they  
7 stay. The question then is, should the other -- should

8 157 other counties have been joined?

9 That comes down into two separate questions, okay.

10 First is, what might we need discovery from 157 other  
11 counties and from a non-party Secretary of State. The  
12 answer is, yes. We will need discovery from the Secretary

13 of State, and we'll need discovery from -- from other  
14 counties, maybe.

15 We don't believe actually that substantial discovery  
16 will be required from every county. And the reason for

17 that is that the Secretary of State, not as a party, Your  
18 Honor, I'm not arguing that piece, but as the repository  
19 of the information.

20 The Secretary programs the ballots, programs all the  
21 machines, programs the poll books, tabulates the results,

22 announces the results, all of those things. And so, the -  
23 - so the Secretary is here within the jurisdiction of this

24 court -- to court -- to respond to discovery.

25 In addition, Your Honor, has plenary power, plenary

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1 power in the statutes that we have cited, to grant the  
2 relief that we're seeking. There's no requirement that we  
3 file suit against every county. Instead, the counties

4 that we have sued are proper.

5 And whether we can prove that is up to the next

6 hearing, it's not up to today. But we believe we can  
7 prove that through discovery. And that the 157 counties

8 are not necessary to be joined. If they are necessary to  
9 join them, then we'll join them and that's a separate  
10 issue. Thank you, Your Honor.

11 THE COURT: Anything further? Anything further?

12 MR. BROWN: I have nothing further, Your Honor.

13 THE COURT: We have to do these cases as fast as we  
14 can do them, and I respect that, and I'm trying to do this

15 as fast as I can. But given the status of what is  
16 actually before me, not all this 180 pages of evidence and

17 all this stuff I've been dumped on, and which -- anyway.

18 I won't go there. It's very hard for me to be able to  
19 download some of that stuff.

20 But I've done them. I've taken them off. But in  
21 that status, I'm going to deny your motion. Whether it

22 will become relevant at the end of the hearing, I don't  
23 know. But at this point, both those motions as to adding

24 the parties and as to them being improper parties --

25 MR. BROWN: Thank you, Your Honor.

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1           THE COURT: Does Gwinnett have any other motions  
2 applicable just to Gwinnett?

3           MR. RUSSO: No, Your Honor, I don't believe we do.  
4

5           We obviously join the other motions regarding kind of the  
6 -- claim.

7

8           THE COURT: (inaudible)

9           MR. RUSSO: There is a complaint, I think that's it,  
10 so.

11          THE COURT: Okay. Fulton, you've got it. Anything

12 else that you wanted to say? Come around, if you will.

13          I'm sorry to address you by county, but I have a cheat  
14 sheet here with everybody's name, and I think I've lost

15

16          it.

17          MS. BURWELL: The -- the point I was making on  
18

19          whether or not Fulton County was a proper party was that  
20 the Fulton County Board of Registrations and Elections

21

22          isn't capable of providing the petitioners with the relief  
23 that they're seeking, which in essence is changing out DRE  
24 machines.

25

26          They don't want Georgia citizens to use the DRE  
27 voting system. Well, Fulton County, like every other  
28 county in the state, is constrained by state law to comply  
29 with state law, which requires us to use the DRE machines.

30          Now, the response that plaintiffs had to our motion  
31 to dismiss was merely, number one, that the Board of

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1      Registrations and Elections could require citizens to vote  
2      via absentee, and that's clearly not the case. Citizens  
3      get to decide how they vote, not the Board of

4      Registrations and Elections.

5                 The only other issue they raised was OCGA21-2-366 and

6      they raised that for the proposition of saying that  
7      "Fulton County in fact could decide what kind of voting

8      system is in use" and that's just not the case. What the  
9      Court looks at 21-2-366, it only provides that the  
10     governing authority of a county, which is not the Board of  
11     Registrations and Elections, it's the Board of  
12     Commissioners -- can authorize the use of optical scanning

13     voting systems.

14                 Well, the Board of Commissioners is not a party to

15     this action; the Board of Registrations and Elections is.  
16                 And so, the -- our position is that the county's position

17     with respect to whether or not it is a proper defendant is  
18     unrefuted by the plaintiffs.

19                 And then the only other issue we had raised, Your

20     Honor, was the lack of service. At the time we filed our  
21     motion to dismiss, they had not served.

22                 THE COURT: They had not served?

23                 MS. BURWELL: Yes, they served us on December 26 .<sup>th</sup>

24                 THE COURT: All right.

25                 MR. BROWN: Your Honor, I believe Your Honor's

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1 already ruled that Fulton and Gwinnett are proper parties.

2 And I'm not sure I understand Fulton's argument that  
they're incapable of -- of conducting the elections. I

3

4 think that's an issue that may come later in terms of what  
sort of remedy that you offer, Your Honor.

5

6 Our position is that, number one, when you have the  
trial, the -- we will be able to show that a new election

7

8 should be ordered; that's the first argument. The second  
9 argument is, if you do order a new election, on what  
10 machines or what is -- what type of election should that  
11 be? Should that be machines, or should that be paper?  
And that's what Fulton County is talking about is

12

13 really two or three issues; two steps away from where we  
are today. Our position will be that Fulton County is

14

15 capable of -- of conducting a paper ballot election  
without using these flawed machines.

16

17 And that that's authorized under the code provisions  
18 that -- that we have cited. And that they don't need a  
Secretary of State's approval to do that, but certainly

19

20 Your Honor could order them to do so, if you've felt that  
was necessary, but again I think that's --

21

22 THE COURT: Asking further from Fulton County?  
MS. BURWELL: No.

23

24 THE COURT: Okay. I'm going to deny that, again at  
25 this point when you all stop talking, arguing the

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1 evidence, then the motion to dismiss this is doing a lot,  
2 okay. Does that mean -- after we have a -- have a hearing  
on the matter, I don't know. But I'm happy to try it.  
3

4 But right at this point, I'm bound by what the rules  
say. That's if a slight -- allegations are -- I have to  
5

6 follow. Okay, so we haven't generalized the motion to  
dismiss, did you need to be heard on that as well.  
7

8 MR. RUSSO: No, not on that issue.

9 THE COURT: I didn't think so. This is generalized.  
10 Everybody seems to have generalized motions dismissed on  
11 the pleadings. Let me hear that.

12 MR. RUSSO: Would you like to hear from --  
13

14 THE COURT: On count one.

15 MR. RUSSO: Sure. Would you still like to hear from  
us or --  
16

THE COURT: Whatever order you want to do it.

17 MR. BELINFANTE: I mean, I'm happy to make our  
18 argument. I'm happy to make our arguments on it.

19 MR. LINDSEY: Your Honor, Edward Lindsey once again,

20 attorney on behalf of Lieutenant Governor-elect Geoff  
Duncan. As was previously stated, Mr. Duncan won his race  
21

22 by over 123,000 votes. I'm going to go through some  
numbers, Your Honor, and I'm going to ask you to simply  
23

24 take judicial notice, which I believe you're entitled to.

25 As a matter of public records; in terms of public records.

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1       The case I'll cite for taking judicial notice would  
2   be Johnson vs. Adams 323-Georgia-P0427 and that particular  
3   case that was taking judicial notice of a separate lawsuit  
4   of a -- separate case in bankruptcy court, but  
5   nevertheless, the rule is that the courts in a motion to  
6   dismiss, I believe, courts can take judicial notice of  
7   such matters.

8       And the only thing that I'm going to be talking about  
9   are the official numbers from the Georgia Secretary of  
10   State's office, certified numbers. Court, in such cases  
11   such as ours needs to remember that the setting aside of  
12   an election in which the people have chosen their  
13   representative, is a drastic remedy that should not be  
14   undertaken lightly, but instead should be reserved for  
15   cases in which a person challenging an election has  
16   clearly established a violation of elections procedures.

17       And has demonstrated that the violations have placed  
18   the result of the election in doubt; that's not our  
19   assertion, Your Honor. That's a big court decision. In  
20   the case of Hunt vs. Crawford 270-Georgia-7, a 1998  
21   decision in my brief we filed yesterday, Your Honor, we  
22   sort of outlined that that's -- what's clearly required is  
23   that the plaintiffs --

24       And at this point, Your Honor, that the pleadings  
25   must show that the plaintiffs are asserting that as result

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1 of the defects that they are alleging, that it places the  
2 -- the outcome of the election in doubt. And the courts  
have established somewhat of a mathematical test.  
3

4 And I'm glad to hear that you said you were a math  
major, so I'm going to simply talk about a little math  
5

6 here. The -- the plaintiffs, you know, or the petitioners  
have alleged several things. On number one they say, that  
7

8 "as a result of these nefarious defects, the -- the total  
9 number of votes cast in the lieutenant governor's race was  
10 dramatically below those of other down-ballot statewide  
11 races."

Well, if you look at our particular case, like I  
12  
13 said, 123,000 votes, 123,172 votes; that's the certified  
result number. If you look at the -- the -- the highest  
14  
15 number of votes that were cast in any of the down-ballot  
races -- that would be the Secretary of State's race. And  
16  
17 in that race, there were 3,883,594 votes total cast.

18 In the lieutenant governor's race, that's 3,780,304.  
So even if we were to accept -- and the Court is required  
19  
20 to do here -- the petitioner's allegations that there was  
something nefarious or -- or negligent in terms of the  
21  
22 counts, votes that were counted.

The difference between what took place in the  
23  
24 lieutenant governor's race total votes and the Secretary  
25 of State's total votes is only 103,290 votes. That's

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1    19,882 votes short of the margin of victory that Mr.  
2    Duncan enjoyed.

3                 The next thing that the -- that the petitioner  
4    asserts in its allegation is that there was a drop-in vote  
5    between those -- in -- in terms of the drop-offs, which

6    are the number of people who voted in one race but didn't  
7    vote in the another. They assert that there's a dramatic  
8    difference between the drop-off between the governor and

9    the lieutenant governor's race, and between the paper  
10   ballots versus the electronic voting.

11               And they assert essentially that in the paper ballots  
12   there was a drop-off of only 98.9%, but in the other case

13   there was a dramatic drop-off below that number. If you  
14   were to accept their assertion that there should have been

15   the same drop-off between the governor's race and the  
16   lieutenant governor's race, the numbers still come up

17   short as a matter of math.

18               In this particular case, Your Honor, if we were to  
19   accept the petitioner's allegations that there's -- that

20   the drop-off between the governor's race and the  
21   lieutenant governor's race should have been the same

22   between the write-in, between the paper ballots and  
23   electronic ballots that would have raised the number of

24   votes cast in the lieutenant governor's race to 3,895,955.

25               That's still, Your Honor, would have only increased

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1 the number of votes cast to be 115,691 votes, which is  
2 still below 123,000-plus votes cast. The third allegation  
3 that the petitioner asserts in their petition is that  
4 there was in terms of the drop-off between -- in the  
5 electronic voting between those who voted in the  
6 governor's race and the lieutenant governor's race had a  
7 particularly negative impact on the democratic candidate  
8 Ms. Miko.

9 If you were to take that as truth and simply allow  
10 for the same percentage of votes for Ms. Miko that Mr.  
11 Duncan enjoyed in terms of -- of the -- the percentage of  
12 votes that they received versus the gubernatorial race,  
13 you still end up 53,902 votes short of what the -- of the  
14 number that is needed that would have closed the gap at  
15 53,902, so in other words you're still short of 123,000  
16 votes.

17 And -- and that's the key -- and that's the key. In  
18 all cases, in the Supreme Court cases, is you've got to  
19 have a show that the number of votes that were either  
20 miscounted or not counted properly would have wiped away  
21 the margin of victory that the winner enjoyed.

22 And we've cited several cases as have everyone else  
23 that demonstrates that's the rule of thumb. By the -- in  
24 terms of petitioner's allegations -- each of their  
25 allegations, Your Honor, I want you to take judicial

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1 notice of certified results from the Secretary of State.

2 They fall short of that golden number, by any number  
3 between 8,000 to 80,000 votes short, depending on the --

4 their various allegations.

5 I would point out, Your Honor, that the petitioners'

6 themselves in their exhibit to their petition included an  
7 exhibit from a letter from Ms. Amico who said in the

8 letter, "the number of residual votes in the lieutenant  
9 governor makes it unlikely to affect the outcome of my  
10 race." She's right, Your Honor, because she also  
11 understands the math.

12 So, Your Honor, we would simply ask for a motion to

13 dismiss based on the petitioner's petition when you take  
14 judicial notice of the public record regarding the

15 certified results from the election from all the races.

16 Thank you, Your Honor. Does the Court have any

17 questions?

18 THE COURT: No. Anybody else --

19 MR. TYSON: Yes, Your Honor. Thank you, Your Honor.

20 Again, Bryan Tyson for Gwinnett County.

21 I think the thing to keep in mind is that when we're

22 in this posture after a certified result from an election,  
23 the election is presumed valid. And if you were in a

24 scenario where, let's say you have 100-vote margin.

25 And you allege, you put in your petition that 99

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1 either illegal votes were cast or legal votes were  
2 rejected, that petition would be properly subject for  
3 dismissal for failure -- failure to state a claim, because

4 you have to allege a sufficient number of votes that would  
5 have placed the result in doubt or would have been

6 sufficient to change the result of the election.

7 And in this case, the plaintiffs have not made any

8 such allegation in their petition. In addition, the --

9 there is conflicting causes of action referenced in the

10 motions to dismiss. In the petition the plaintiffs that

11 they say that they're proceeding under 521-1 and 3.

12 In their response to the motion to dismiss, they're

13 relying on 1, 3, 4, and 5, but I think the most important  
14 thing for the Court to remember in terms of looking at the

15 petition itself, is what it stated, is that the  
16 irregularities that the plaintiffs have alleged only

17 involve a 100 or so votes here and there across the state.

18 They also involve claims of machine malfunction in  
19 DeKalb County in paragraph 42 of the complaint. Of

20 course, the plaintiffs have dismissed DeKalb County from  
21 this lawsuit. And the -- the collection of information

22 that's in the petition is a bunch of kind of one-off  
23 programming errors.

24 Most of them are unverified and anonymous, and

25 significantly they don't get anywhere close to the

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1 123,000-vote threshold that they would -- that the  
2 plaintiffs had to plead in order to state a claim here  
3 because of the way the Supreme Court precedent works.

4 I'm in Ellis vs. Johnson 2623-Georgia-514, the  
5 Supreme Court is very clear that speculation alone is not

6 enough. There has to be -- has to be a specificity in  
7 terms of the mathematical certainty of what happened. And

8 we see that over in Mead, in Howell, and in just a number  
9 of Supreme Court cases, that it is proper for the court to  
10 look at motion to dismiss, first of all, because those  
11 cases were decided based on motions to dismiss.

12 But second that it's proper to look at the

13 allegations and see have the plaintiffs alleged this  
14 123,000-vote margin that would be sufficient to place the

15 result in doubt. And we would submit that they have not  
16 done that in the four corners of their petition. On that

17 basis it should be dismissed for failure to state a claim.

18 THE COURT: Does Fulton want to be heard on that?  
19 MS. BURWELL: We join in, all the others.

20 THE COURT: You just joining them now?  
21 MS. BURWELL: Yes. Thank you, Your Honor.

22 THE COURT: (inaudible)  
23 MR. BROWN: Thank you, Your Honor. The -- the

24 defendants have pointed to one of the most egregious  
25 pieces of evidence showing the total system failure of --

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1           THE COURT: But -- but -- but that's not -- this is  
2        -- that's a wonderful opening statement. This is not that  
3        day, okay?

4           MR. BROWN: Okay.

5           THE COURT: Just respond, if you will, to what --

6           MR. BROWN: Sure. The --

7           THE COURT: I don't do well with --

8           MR. BROWN: Okay. The --

9           THE COURT: -- inflammatory -- just stay within what  
10      we're -- what --

11        MR. BROWN: Sure. The undervote is an illustration  
12      of the system problems that we allege in the complaint.

13        Allegations that, as Your Honor has already mentioned,  
14      must be accepted as true.

15        THE COURT: All right.

16        MR. BROWN: The -- the numbers that Mr. Lindsey was

17      giving, Your Honor, are not our entire case. Instead what  
18      we have alleged is that the system malfunctioned as  
19      reflected by the undervote, which is unexplained in -- in

20      ways that happened statewide.

21        The defendants interpret -- we have a different

22      interpretation of the legal requirements here. First in  
23      terms of what's subjectively required, and then second,

24      the procedural policy.

25        First, Your Honor, in the Supreme Court in the cases

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1       in which the nature of the voting problem is not  
2       quantifiable, the plaintiff is not required to count up  
3       the votes and show the difference. For example, in the  
4       Stiles case, 252-Georgia-260, the Supreme Court found that  
5       there were irregularities and misconduct and ordered a new  
6       election despite no proof of the numbers involved.  
7                      Similarly, in the Hunt case, although the contestants

8       lost the Hunt case, this is 270-Georgia-7 -- one of the  
9       reasons why the plaintiffs lost is that the Court found  
10       quote "moreover, there was no evidence introduced at trial  
11       from which it can be inferred that the misconduct was more  
12       widespread than the record indicates."

13                  The Supreme Court is -- is signaling that if there is  
14       evidence introduced at trial from which it can be inferred  
15       that there was a widespread problem, that the case may be  
16       made.

17                  And so the -- the cases that they cite we have no  
18       quarrel with, Your Honor, but those are cases in which the  
19       impact of a mistake is easily quantifiable because you

20       have the illegal ballots sitting there physically in front  
21       of the Court, and you're able to count them up and to

22       determine whether or not it's enough to make a difference.  
23                      And certainly, if you have seven illegal ballots in

24       front of you and the margin and difference is eight, then  
25       you know that that's insufficient. But in those cases

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1 where the mistake is not quantifiable, then that is not  
2 the approach that the Court has taken, and that, again, is  
3 the Stiles case.

4 And -- but this leads, Your Honor, back to the  
5 procedural posture of the case. In all of these cases --

6 and I will just read these to you. What the -- what the  
7 courts are saying about the evidence is after a trial, for

8 example -- these are not examples. This is what I found  
9 in -- in review of all of the cases they have cited.

10 In Banker vs. Kohl, 378-Georgia-532, what the Court  
11 said, quote "Evidence presented at the trial court," and  
12 then went on to explain. In Dawkins-Haigler 30177, the  
13 Supreme Court says, "after a lengthy hearing the trial  
14 court concluded..."

15 And then in Fuller 284-Georgia-397, the Court  
16 explained that the case proceeded to trial. In Hunt vs.

17 Crawford, 270-Georgia-7, the Supreme Court said, at trial,  
18 "Hunt admitted making telephone calls," and then went into  
19 the evidence of misconduct.

20 In Mead vs. Sheffield, the case that's discussed by  
21 both parties, the Court notes, "it was established at the  
22 evidentiary hearing," and then went in to show how it was  
23 established, that in fact the case had been made for a new  
24 trial.

25 Scoggins, again, 288-Georgia-26, the Supreme Court

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1 said, "after hearing on the merits," and then explained  
2 how in fact the plaintiff prevailed after hearing on the  
3 merits. Your Honor, there is one case in which the trial  
4 court did grant a motion to dismiss for failure to state a  
5 claim, and only one.  
6

7 And that is the trial court in the Taggart case, 242-  
8 Georgia-454. The trial court, without an evidentiary  
9 hearing, dismissed the petition for failure to state a  
10 claim on similar grounds the defendants urge in this case.  
11 So, the trial court decision in that case would be the  
12 sole precedent that I can find to support the defendant's  
13 position in that case.  
14

15 However, on appeal that holding was reversed by the  
16 Supreme Court. And the Supreme Court held, quote "A  
17 petition should not be dismissed for failure to state a  
18 claim unless it discloses with certainty that the  
19 plaintiff would not be entitled to relieve under any set  
20 of facts."

21 Interestingly, the Taggart case also involved the  
22 type of situation -- it involved actually two different  
23 kinds of challenges, two different problems in the  
24 election. One problem had to do with quantifiable ballot  
25 issues where you could count them up and you could  
determine whether or not it was enough to make a  
difference.

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1       But the other part was the -- the contestant alleged  
2       that the machines were -- were operating improperly. More  
3       like our -- more analogous to our case here. And in  
4       Taggart, the Supreme Court held, quote "Similarly, doubt  
5       may be cast on an election by showing improper maintenance  
6       of the voting machines resulting in votes being miscast."  
7                   And then in their ruling reversing the trial court  
8       for dismissing the case, the Court notes, "All this is a  
9       matter of proof." Now in the Taggart case it came back on  
10      appeal and the plaintiff failed to prove it and lost. But  
11      it is a matter of proof.

12                  If the plaintiff can prove that improper maintenance  
13      of the voting machines resulted in votes being miscast,  
14       which is what we allege, Your Honor, then we're entitled  
15      to victory and entitled to relief, and if we're not, if we  
16       can't prove it, then we're not entitled to relief. And  
17       that's -- that's clear from the cases.

18                  Now in terms of -- of -- I want to return to the  
19       allegations that we make and the -- the breadth of it.

20      First, we allege that the state's system is fundamentally  
21       flawed from the start and that we note that the persuasive  
22       opinion by Judge Totenberg in which she describes the  
23       system as being --

24                  THE COURT: I'm not bound by it to her at all.

25                  MR. BROWN: You're not bound by her ruling at all.

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1           THE COURT: You can try to hand it to me, but I'm not  
2 bound by it.

3           MR. BROWN: No. It's -- we think it's persuasive

4 but, of course, you're not bound by it. But she did find  
5 that the -- that the same system is profoundly vulnerable.

6           THE COURT: Okay. I -- I don't care what you've  
7 found. It's got nothing to do with the burden of proof.

8 The burden of proof will be on you to get that far.

9           MR. BROWN: Right.

10          THE COURT: The burden of proof is on you.

11          MR. BROWN: Right.

12          THE COURT: But you can't prove it by -- the judge.

13          MR. BROWN: That's -- yes, Your Honor. But it will  
14 be proven with the evidence that persuaded Judge

15 Totenberg, we would -- we would suggest. And if -- Your  
16 Honor, it could very well be that at trial we're not

17 persuasive.

18          But we do have the opportunity to prove that and as  
19 of -- one of the things that -- what motions to dismiss

20 law is, Your Honor, is that -- what the law says is that  
21 there's no reasonable possibility that the plaintiffs can

22 prove their case, then they lose.

23          And what we're suggesting is, having already proven

24 some of these things, that it's -- it's important to

25 consider that and projecting what we'll be able to win in

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1 this case.

2 THE COURT: Yeah, but I don't -- in this courtroom --  
3 MR. BROWN: That is correct, Your Honor, but --

4 THE COURT: -- has proven that.

5 MR. BROWN: That's correct. But in considering the

6 motion to dismiss one of the issues is, will they be able  
7 to prove it, and we believe we will.

8 Now, what we have alleged, Your Honor, which must be  
9 accepted as true, regardless of Judge Totenberg's  
10 decision, it must be accepted as true that these systems  
11 are fundamentally unreliable, period. That has to be  
12 accepted as a fact for right now.

13 Number two, we have given illustrations and alleged  
14 of particular instances in which these machines have,  
15 throughout the state, malfunctioned.

16 Three, we have shown the results of these  
17 malfunctions in an unexplainable pattern of voting in  
18 which we will present expert testimony saying that this  
19 cannot be explained except in terms of machine  
20 malfunction, a statewide systemic machine malfunction.  
21 And it is not just simply the under-vote that Mr. Lindsey

22 tries to calculate. It's that the entire voting system  
23 was flawed. And so, the votes for Mr. Duncan, the votes  
24 for Ms. Amico, that entire election was flawed. And  
25 that's what we allege, and we're entitled to be able to

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1 prove it. And so, under those facts, we believe that  
2 we're entitled. We have -- there -- we have alleged  
3 evidence, Your Honor, of the -- this particular race not  
4 being on the electronic screen, of the screen flipping  
5 between one and the other.

6 THE COURT: Is that your petition?  
7 MR. BROWN: It is. And instance after instance of  
8 this that we have alleged, and we're entitled to prove  
9 that, and we believe we will. And so, we have the -- we  
10 have alleged a fundamental unreliability of these  
11 machines. We have alleged specific incidences that can  
12 only be explained by a malfunctioning system that was  
13 statewide that can -- and from that, to borrow the  
14 language from the Supreme Court in the Taggart case, from  
15 which we believe, Your Honor may infer, you don't have to  
16 but we believe we will be persuasive that you can infer a  
17 much broader problem.

18 And we also believe that as one illustration of the  
19 problem is the under-vote, the totally unexplained  
20 difference between the electronic vote totals and the  
21 paper vote totals.

22 The defendant's offer -- this is not an evidentiary  
23 hearing, but they have not offered any plausible  
24 explanation for why simply by the mode of electing, there  
25 would ever be such a dramatic difference in the drop-off

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1 rate.

2 And the -- what that shows are not that that  
particular margin is wrong, but that the entire race is

3

4 wrong. It's like -- there's that old phrase is the clock  
that struck 13, Your Honor. And when a clock strikes 13,

5

6 not only do you know it's not 13 o'clock, but you doubt  
every single chime that has come before it because the

7

8 clock isn't working.

9 And the under-vote is the clock that struck 13. And  
10 we would -- we would say that for all those reasons we  
11 state a claim for relief, and that in -- in no case held  
12 has a motion to dismiss for failure to state a claim in  
13 election case been sustained and it certainly should not  
14 be the case in this case. Thank you, Your Honor.

15 MR. LINDSEY: If I may, Your Honor, please.

16 THE COURT: (inaudible)

17 MR. LINDSEY: The issue in this case is not an  
18 allegation of misconduct by anyone advocating for or  
19 against a particular candidate. The allegation in this  
20 case is that votes were not -- people were not able to  
21 cast votes, and votes were not properly counted. The case  
22 in which Mr. Brown relies upon and cited to you repeatedly  
23 with the Stiles vs. Earnest -- Earnest who was the  
24 election superintendent, 252-Georgia-260.

25 That particular case, Your Honor, had nothing to do

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1 with whether or not votes were properly counted, or the  
2 machines were operating properly. Instead, it had to do  
3 with allegations of misconduct by advocates for a  
4 referendum. Totally different situation.  
In our situation, Your Honor, in which we are dealing  
5  
6 with whether or not votes were properly counted. The  
7 cases that we have cited to you and I'll cite to you once  
8 again, the Fuller vs. Thomas case, a Georgia Supreme Court  
9 case, 284-Georgia-397, in which the Court held, when the  
10 focus is on improperly cast ballots or irregularities in  
11 the conduct of the election, the number of legal or  
12 irregular ballots necessary to cast doubt on an election  
13 is derived by taking the difference between the total  
14 votes cast in the election and erase that issue and adding  
15 the margin of victory in the race issue.  
In other words, you've got to show -- to begin with,  
16  
17 you have to allege that any irregularities in terms of the  
18 machines or anyone counting the votes would have an impact  
19 on the margin of victory in which case -- in this case,  
20 like I stated earlier, with over 123,000 votes.  
The fact of the matter is within the four corners of  
21  
22 the plaintiff's petition, nowhere, nowhere do they allege  
23 that these irregularities closed -- were -- resulted in  
24 the number of votes that were improperly cast or not  
25 properly counted were greater than 123,000 votes.

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1           That's kind of the fundamental first step that they  
2       must allege in order to have a case move forward. When  
3       you then add to that the public records that I've asked  
4       you to take judicial notice of, that Mr. Brown has not  
5       disputed and I walked through so tediously, it  
6       demonstrates that even in the worst-case scenario that  
7       were alleged in the Petition, he falls -- the votes fall  
8       short of the margin of victory.

9           And for that reason, in this particular case we ask  
10      for you to grant our motion to dismiss. Thank you.

11          THE COURT: (inaudible)  
12          MR. RUSSO: Very brief, Your Honor. Just cover three

13          quick points quickly, Your Honor. First of all, the  
14       allegations here regarding the -- the only -- I should  
15       say, the only type of election contest where you're not  
16       required to put forward specific evidence or pleading  
17       regarding a number is in 524(c) when the error of counting  
18       the votes is alleged as a ground of contest.

19           There's a specific provision that says you're not

20       required to show evidence to substantiate the allegation.  
21       You -- you're not required in that one type of contest.

22       That is not this type of contest.

23           Mr. Brown has, secondly, has alluded to the idea that  
24       the lieutenant governor's race did not appear on some  
25       ballots. If you look at both Mead and Howell, you'll see

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1 cases where you had to plead and show the number of  
2 ballots where the name of the candidate did not appear.  
That's one of the allegations that the plaintiffs  
3  
4 have not pled that it did not appear on at least 123,000  
voting machines along the way. Mr. Brown also continues  
5  
6 to insist that there's no other valid explanation when any  
number of ballot explanations may exist.  
7

8 And as we discussed before, the -- Mr. Brown and the  
9 plaintiffs may not rely on mere speculation. They have to  
10 plead with specificity in their petition that the outcome  
11 would have changed or that the irregularities were  
sufficient to place the result in doubt. Thank you.  
12

13 THE COURT: This is so close. You know, it was  
presumed, I'm waiting for -- is that the election returned  
14  
15 the bath. Okay? Now, the part of your job is above the -  
- Your job, Counsel, -- of placing doubt on the results of  
16  
17 the election.

18 And that's done usually by numbers, through math.  
And the math is against you. You have chosen not to  
19  
20 allege any math in your petition, okay. You have alleged  
-- I had it somewhere in front of me, but anyway, you have  
21  
22 alleged that the result would be different or is in  
substantial doubt. But I haven't found it.  
23

24 MR. BELINFANTE: Yes, Your Honor.

25 THE COURT: I forgot the exact language. I had it,

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1 but I've lost it. All right, yeah. The -- the -- to  
2 place in doubt the result of the entire election, okay.  
3 The numbers aren't weighty, okay. But you've got some  
4 generalized arguments about the systemic failure of the  
5 whole system that might -- that might cast -- which makes  
6 the math an issue.

7 It's a huge burden for you to carry, but the  
8 petition, it's sufficient to have a try. I -- I hate to  
9 do that, but it's -- it's -- if we have to take the four  
10 corners of the petition, it really doesn't matter if it's  
11 badly pled. I'm not saying it's badly pled. You didn't  
12 plead numbers.

13 But the cover clearly says, "under F of -- of 524,  
14 that the form -- form of process is not material. It's --  
15 it's -- the election contests are interesting. There was  
16 kind of different than we've seen on things. It's a very  
17 close question, sir.

18 It is a very close question, and -- and -- and you  
19 need to be aware I don't do well with inflammatory stuff.  
20 I don't get inflamed by attention -- and -- and what other  
21 judges do is not -- okay. So, understand you've got two  
22 rules.

23 I am going to deny the motion to dismiss. I -- I --  
24 it's extremely close, but on the kind of pleadings, I'm  
25 looking for originals in that cover section about, you

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1 know, don't worry about form and so on and so forth. I'm  
2 going to let it go forward, but the plain numbers are  
3 against you. So, you -- you've got some -- an uphill  
4 battle.

5 MR. BELINFANTE: Okay then. Thank you, Your Honor.

6 THE COURT: Can you take a moment, drop a line -- and  
7 -- and --

8 MR. BELINFANTE: Yes, Your Honor.

9 THE COURT: You all know where I am because you've  
10 been emailing me, so send it to me, okay. I can't  
11 download a pack. Don't ask me why. I am supposed to be  
12 retired next year.

13 MR. RUSSO: Your Honor, would you like us to submit a  
14 joint motion?

15 THE COURT: What?

16 MR. RUSSO: Would you like us to submit one motion --  
17 I mean, one order, one proposed order?

18 THE COURT: You could even do one proposed order, or  
19 if you can agree on it or you can do them separately about  
20 that.

21 MR. BELINFANTE: I think we'll probably --

22 THE COURT: I'm fixing to go into two full weeks of  
23 work, so you'll be able to get -- okay. What else do we  
24 have from the defendant?

25 MR. BELINFANTE: Your Honor, we have -- we have two

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1 motions that are --

2 THE COURT: Well, no, I know what -- what you have.  
MR. BELINFANTE: Oh, I'm sorry.

3

4 THE COURT: I don't think I read all this stuff,  
okay? Okay?

5

6 MR. RUSSO: Your Honor, for the Secretary of State,  
this is joined by the other defendants, I believe.

7

8 THE COURT: Is this on the two constitution --

9 MR. BELINFANTE: On the two constitutional --

10 THE COURT: We have two constitutional claims and  
11 then we'll do your motions. And I've got those too; don't  
worry about it. All right. Go ahead.

12

13 MR. BELINFANTE: Okay. Thank you, Your Honor. I'm  
going to address just the two counts. The one for due

14

15 process and the right being identified there is the right  
to vote. The second is the Equal Protection Clause.

16

17 Now there's -- we'll rest largely on the briefs in  
18 terms of sovereign immunity, but the point to take from it  
is that the Equal Protection Clause and the due process  
19

20 clause are completely contingent upon what Your Honor  
rules on the underlying election challenge, count one.

21

22 Their briefs make that plain. The relief they seek,  
it's in paragraph 71 and 75, is the right to vote in a new  
23

24 election for lieutenant governor, not any other future  
25 one. And in 72 and 76, it says that it would be remedied

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1 by holding a new election.

2 So, if the Court at the conclusion of the evidence,  
or at least at the conclusion of the plaintiff's case,

3

4 decides that there is no basis to go forward, the  
constitutional claims equally fail. They -- they rise and

5

6 fall together.

7 So, the question before you on the motion to dismiss

8 is have they alleged sufficient facts to state a claim for

9 due process and for equal protection, and Your Honor, the

10 answer is simply no, based on the Favorito decision from

11 the Supreme Court of Georgia in 2009. I have a copy of  
it, if the Court would like, and provide one to opposing

12

13 counsel as well.

14 MR. BROWN: Thank you, sir.

15 MR. BELINFANTE: And I'll be referring to Favorito  
throughout the argument. The question on the due process

16

17 claim is what is the standard of review. Is it strict

18 scrutiny, is it rational basis?

19 And Favorito answers that question in the latter. It

20 is a rational basis test. It says on page 796, quoting a  
decision from the 11th Circuit, Wexler vs. Anderson, that

21

22 when a state election law provision imposes only  
reasonable non-discriminatory restrictions upon the 1st

23

24 and 14th Amendment rights of voters, the state's important

25 regulatory interests are generally sufficient.

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1           Using the word "reasonable" the Supreme Court noted  
2       and applied a rational basis test. And, in fact, it goes  
3       on to say that there is a rational reason to use DRE  
4       machines on the same page.

5           It says, "it is the job of democratically-elected  
6       representatives to weigh the pros and cons of the various  
7       balloting systems. So long as their choice is reasonable  
8       and neutral, it is free from judicial second guessing,"  
9       once again confirming that we're in a rational basis test  
10      review.

11           And now using -- applying that standard, looking at  
12       the due process claim, which is paragraph 62 to 72, count  
13       two, in the complaint. The defendants do not disagree  
14       that the right to vote is fundamental. The disagreement  
15       is that they have not alleged a burden for which there is  
16       not a rational basis to use the DRE machines.

17           And to look -- to see that you need only look at  
18       paragraph 69 of the complaint. There the plaintiffs or  
19       the petitioners allege that using defective DRE machines  
20       in a flawed and inaccurate voter registration and  
21       electronic poll book system, defendants have knowingly and  
22       severely burdened and infringed upon the fundamental right  
23       to vote.

24           Now you compare that to what the Supreme Court  
25       described as the cause of action in *Favorito*. This is at

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1 page 795 and 796 of that case in the Georgia reports.  
2 There the Supreme Court described the petitioner's claims  
3 as -- in three counts of their complaint, appellants  
4 allege that this state's use of the DRE equipment denies  
5 them equal protection under the federal and state  
6 constitutions, and the fundamental right to vote under the  
7 due process clause of the 14th Amendment.

8 Their claims are virtually identical. And so, then  
9 applying the rational basis test that Favorito did, the  
10 law is clear. There is a rational basis to use the DRE  
11 machines. And in the case, it's important that the Court  
12 citing the Weber vs. Shelley decision from the 9th Circuit  
13 in 2003, acknowledged all the risks that are contained in  
14 the petitioners' claims now.

15 The court said in Favorito, again citing Weber, page  
16 797, "no balloting system is perfect." Traditional paper  
17 ballots, as became evident during the 2000 presidential  
18 election, are prone to over-votes, under-votes, hanging  
19 chads, and other mechanical and human errors that may  
20 thwart voter intent.

Meanwhile, touchscreen voting systems remedy a number  
21 of these problems, albeit at the hypothetical price of  
22 vulnerability to certain types of fraud. And it's the job  
23 the Court continued to say of the legislature to decide  
24 which of those two risks it is going to use.

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1        In fact, the Court says expressly, it's the job of  
2        democratically-elected representatives to weigh the pros  
3        and cons. And so long as their choice is reasonable and

4        neutral, it's free from second guessing.

5              And then it goes on to really put the nail in the

6        coffin here, "in this instance Georgia made a reasonable  
7        politically neutral and nondiscriminatory choice to

8        certify touchscreen systems as an alternative to paper  
9        ballots." Nothing in the Constitution prohibits this  
10      choice.

11              That forecloses the due-process argument, because  
12        despite however it can be dressed up, it is an attack on

13        the DRE machines themselves. The DRE machines were  
14        attacked in 2006, and by the time they got to the Supreme

15        Court in 2009, the Court said it is insufficient.

16              The legislature is entitled to choose the DRE

17        machines understanding and knowing all of the risks that  
18        they claim, it is still insufficient to state a claim  
19        under due process. If you then look to equal protection,

20        Favorito blocks the claims again.

21              Once again, the allegations are identical from what

22        the plaintiffs allege or the petitioners here and what  
23        they alleged in Favorito. Paragraph 74 of this complaint

24        says, "defendants knowingly treated electors who voted by  
25        DRE differently than others similarly situated electors

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1 voting in the same election in a jurisdiction who voted by  
2 absentee ballot."

3 In other words, if you vote absentee you can do it  
4

5 with a piece of paper. If you vote in person you use a  
6 DRE machine and that is the distinction that they claim  
7

8 sets up the Equal Protection Clause. They make that clear  
9 on pages 43 and 44 of their response to the motion to  
10

11 dismiss.

12  
13 A state election regulation, which they go on to  
14 cite, which discriminates on its face between two classes  
15 of people, namely voters who vote in person and voters who  
16 vote by absentee mail.  
17

18 Now you then look at the Favorito and the court's  
19 description of the argument there and it was the  
20

21 appellants argued that electronic voters are treated  
22 differently from voters who cast absentee ballots on paper  
23 and the procedure for an accuracy of any recount would  
24 differ. The claims are simply identical.  
25 And so, the holding of Favorito is absolutely

dispositive. And this is at page 798. What the court  
effectively says is, a voter can choose. You can vote by  
26

absentee. We have absentee for any reason in this state,  
and if you have a concern that the DRE machine is flawed,  
27

then by all means, vote absentee.

28 It is not a distinction that the state mandates,

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1 which is what is required under equal protection claim.

2 The Court specifically says in *Favorito*, that "as the  
trial court found, Georgia voters have an option."

3

4 And then it continues, if the trial court correctly  
concluded that quote "since every Georgia citizen could

5

6 vote either by absentee ballot or by utilizing touchscreen  
voting systems," appellants contention that there is some

7

8 state-based classification between voters is false.

9 And it continues then to say, "we cannot see how  
10 Georgia has violated the Equal Protection Clause of the  
11 14th Amendment by making these two available pacts. The  
allegations are the same. The case is directly en pointe  
12

13 and Equal Protection and Due-Process Clause should be  
dismissed. Thank you.

14

15 THE COURT: Anybody else for the defendant on that  
issue?

16

17 MR. TYSON: We'll just join the Secretary of State's  
18 argument on that point.

19 THE COURT: Okay.

20 MS. BURWELL: We join in their argument as well, Your  
Honor. Thank you.

21

22 MR. TYSON: Thank you, Your Honor.

23 MR. BROWN: In their motion to dismiss the federal

24 constitutional claims, first Mr. Belinfante's description  
25 of how this claim will interact with the other's claims is

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1 substantially correct, and that is, what we are -- what  
2 the plaintiffs are alleging is that with any new election  
3 going forward prospectively should be conducted on -- not  
4 on these machines, because doing so would be a violation  
5 of due process and equal protection.  
6

7 So that's the -- sort of the procedural posture of  
8 how this claim is seeking prospective relief. Second, the  
9 defendants rely exclusively on the Favorito and Wexler  
10 decisions. The Favorito and Wexler decisions are  
11 fundamentally distinguishable because Favorito dealt with  
12 a 2006-era DRE system.

13 What's -- what has happened and what we allege in our  
14 complaint all are real events in real life that have  
15 changed the system, that make it fundamentally different  
16 than the system that was being reviewed by the courts in  
17 the -- the -- the Favorito case.

18 And as we allege, Your Honor, since the Favorito  
19 case, every single government agency that is responsible  
20 for national security has told the State of Georgia that  
21 the current DRE system is fundamentally insecure.

22 The House Select Committee, the Senate Select  
23 Committee, the Department of Homeland Protection. In  
24 addition, every known computer scientist on record has  
25 said exactly the same thing and has said to Georgia, these  
are unreliable.

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1       They can't be trusted to count votes correctly. That  
2       comes from every single source and there is no evidence  
3       contrary, Your Honor. And this comes from slews of  
4       scientists, and it culminated in a report by the National  
5       Academy of Sciences that came out just this September, and  
6       this is called a Consensus Report, which means that it's a  
7       unanimous of the scientists at the National Academy of  
8       Sciences have collected to consider this exact issue.

9           And that is, are these -- is the system that Georgia  
10      is now using secure enough to be relied upon from -- from  
11      attack domestic and foreign. And the National Academy of  
12      Sciences in September said, don't use these machines  
13      anymore. Don't even use them for the November election,  
14      which Georgia did anyway.

15           And so, the -- the environment is different, Your  
16      Honor. The national security concerns are different. In  
17      2006, the -- the internet system was not getting bombarded  
18      daily by nation states. The -- the system hasn't -- the  
19      -- the -- the malware environment is totally different.

20           We do not allege that the system right out of the box  
21      is flawed, although it's flawed in that it doesn't have a  
22      paper backup, but that's not the nature of it. The nature  
23      of it is is that the way Georgia has not maintained the  
24      system, coupled with the external threat, make it a system  
25      -- and if you use it, you're violating the constitutional

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1 rights of voters because it is fundamentally unreliable.

2 And the right to vote is nothing if their votes are  
3 not counted correctly. And in this system, you never know

4 if your votes are being collected, counted correctly or  
5 not. We will never know, because once a voter makes that

6 transient decision as to who to vote for, that record is  
7 lost forever.

8 We will never know, and this is why the courts who  
9 have recently looked at it have concluded that using those  
10 machines is substantially likely to violate due process  
11 rights and equal protection rights of Georgia voters.

12 And there's no case to the contrary, Your Honor, is

13 that the cases now hold our way on those issues. And what  
14 the defendants do not address -- they -- they address a

15 sort of hypothetical complaint that was maybe filed 15  
16 years ago.

17 They do not address these allegations. They don't  
18 address the fundamental problems. They also don't address  
19 an entirely separate issue and that is that, as we alleged

20 in the complaint, the State of Georgia left this system --  
21 we like to say, left this system out in the rain for six

22 months.

23 The Secretary of State, we allege, left the system

24 open to the internet, to the public internet, from before  
25 the 2016 election until well after, even though it was

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1 informed that the system was open. And when it did so, it  
2 -- it left itself open to be infected by any virus, by any  
3 hacker whether it's someone on their sofa in New Jersey or  
4 in Peenya or in Russia.

5 That's what we also allege. And so, we have a system

6 that according to the National Academy of Sciences, even  
7 without it being left in the rain, is a violation, is so

8 fundamentally flawed and vulnerable, it's a violation of  
9 constitutional rights.

10 And then to make matters worse, the Secretary of  
11 State, even though it knew this was happening, left it  
12 exposed to the public internet to be abused and has not  
13 undertaken any sort of forensic examination to determine  
14 whether or not it's been actually infected with malware as  
15 the results of this recent election would suggest that it  
16 has.

17 And so, we have established that -- that we have  
18 alleged the allegations necessary.

19 THE COURT: -- it's a question of what you allege.

20 MR. BROWN: That's exactly right, Your Honor. I  
21 misspoke. We have alleged --

22 THE COURT: -- what you have alleged.

23 MR. BROWN: We have alleged all the elements of the  
24 claim, and therefore that motion should be dismissed, or  
25 it could be revisited in a motion for summary judgment or

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1 further motions after the election contest issue is  
2 resolved. Thank you, Your Honor.

3 MR. BELINFANTE: Thank you, Your Honor. I'll be  
4

5 brief.

6 On the subsident due process claim, everything,  
7  
8 everything that Mr. Brown just talked about was raised in  
9 the Favorito decision and cited. And in the long footnote  
10  
11 that cites to the Weber case, the court adopts that no  
12  
13 balloting system is perfect.

14  
15 And in specifically again talking about touchscreen  
16 voting systems, it says that the DRE machines do not leave  
17 Georgia voters without protection from fraud or any means  
18  
19 of verifying a vote or a way to audit the recount. The  
20 unfortunate reality is that the possibility of electoral  
21  
22 fraud can never be completely eliminated, no matter which  
23 type of ballot is used.

24 Even assuming that none of the advantages of the  
25 touchscreen systems over traditional methods would be  
sacrificed if voter-verified paper ballots were added to  
the touchscreen system. And it talks about the choice  
that the legislature makes and makes very clear nothing in  
the constitution prohibits this choice.

The legislature is presumed to be aware of all of the  
things that Mr. Brown talks about, and I'll get to that in  
a second. And yet that choice cannot be second guessed by

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1 the judiciary under the guides of a due process claim.

2 Now let's talk specifically about what the complaint  
alleges, because that's what we're here to discuss.

3

4 Nowhere does the complaint that I found cite to any  
specific inherent flaw with the machines. What it says,

5

6 over and over and over again, is that there are  
"vulnerabilities," potential vulnerabilities.

7

8 The National Academy of Sciences cites  
9 vulnerabilities. It's the Homeland Security, cites  
10 vulnerabilities. It's paragraphs 25 through 33, you'll  
11 see a litany of that.

12 That is exactly the type of decision and the risk-

13 weighing that the general assembly is entitled to do, and  
the due process clause does not prevent them from doing.

14

15 Secondly, Mr. Brown tries to distinguish the Favorito  
case based on statements that are frankly not in the

16

17 record regarding the types of machines. If you look at  
18 the complaint, the complaint talks about -- in paragraphs  
21 to 23 is where it describes the machines and how  
19

20 they're used and so on -- it doesn't say that they've been  
changed since 2006.

21

22 What he's talking about is that people now have  
additional concerns about them, but that just brings you

23

24 back to the holding of Favorito, which is that those  
25 concerns are properly waived by the legislative branch,

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1 not the judicial branch.

2 That also speaks to -- and I don't know that there  
3 was a specific response to the equal protection, but

4 certainly Favorito would say and hold here regardless of  
5 how it views the machines. As long as voters have a

6 choice; it is not a state-imposed distinction and no  
7 equal-protection claim can lie.

8 Thank you, Judge.

9 THE COURT: Okay. I'm going to have to take that,  
10 and I'm going to rule on it, and I'm going to do it this  
11 morning. I'll send an email. I want to relook at the  
12 petition. I am ruled -- ruled by what that petition says

13 this morning on -- on that issue, and I -- I want to look  
14 at it again. I've got the issues in my mind about it, and

15 I will look at it, okay.

16 MR. BELINFANTE: Thank you.

17 THE COURT: Anything else for the defendant?

18 MR. RUSSO: No, Your Honor.

19 THE COURT: Okay, then. Plaintiff has some other  
20 motion.

21 MR. BROWN: Thank you, Your Honor. Yes, we have --

22 the -- the main motion that we had, Your Honor, is your  
23 November 29 emergency motion for inspection of electronic

24 election equipment and production of documents. To get to  
25 the bottom of the causes for the machine malfunctions, we

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1 need some discovery, and that's why in November we moved  
2 for a right to inspect the equipment under Rule 34 and  
91134, which is the --  
3

4 THE COURT: What do -- I -- I seek -- don't propose  
more of which I'm not going to sign, which is way beyond  
5

6 anything I think that I'm required to do or should be  
doing. Good many other things, obviously. Tell me a  
7

8 little bit more specifically what it is you want. What do  
9 you want done?

10 MR. BROWN: Well, we -- the plaintiffs would like  
11 discovery of DRE machines to inspect the --  
THE COURT: Which ones? Where? When? How? What?  
12

13 MR. BROWN: Your Honor, we would like to inspect the  
machines that are identified in Exhibit B to our motion.  
14

15 And we would be amenable to meeting with the defendants to  
determine a reasonable time and space -- place for that  
16  
17 inspection. And --

18 THE COURT: It's on the three --  
MR. BROWN: It's the last two pages of the -- the  
19  
20 motion and the last two pages of the proposed order.  
THE COURT: Yes. I have it now.  
21

22 MR. BROWN: And we've identified by -- in -- in many  
instances by serial number the machines that we would like  
23  
24 to inspect. And certainly, by precinct, and as I  
25 mentioned would be amenable to sitting down with the

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1 defense counsel and coming up with a -- a protocol for the  
2 inspection of this equipment that would be -- be orderly  
3 and helpful. And --

4 THE COURT: And when you -- when you mean inspection,  
5 what do you mean, to look at them? Oh, there's a machine.

6 Or do you want to do anything to the machine?

7 MR. BROWN: A full forensic examination to determine

8 what's causing these -- these mistakes to happened, Your  
9 Honor.

10 THE COURT: What do you mean by a full forensic  
11 examination?

12 MR. BROWN: That would be with computer experts to

13 look at the internal memory and programming to see -- to  
14 compare the machines to see what possible defects are

15 causing these systems to malfunction.

16 And they would involve comparing, for example -- one

17 -- in addition we would like machines that were not used  
18 th

19 in the -- in the December 4 runoff elections  
because the difficulty is if you keep on using these

20 machines, they may overwrite the underlying memory. Our  
21 -- this case is about the November election, not the

22 December election, so we would like to look at November  
23 machines that were not used.

24 Now some of the ones, some of the hottest and -- and  
25 most troublesome machines may have been involved in both;

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1       they may have continued to use them. And we may have lost  
2       some evidence there; we don't know, but we've identified  
3       by serial number and by precinct in Exhibit B the evidence

4       that we -- we would like to -- to collect.  
5                  And like I said it's -- some logistics are involved.

6       We would need the systems to be set up so that they  
7       actually run, they can work, so we need -- would need

8       internet connection and an AC tower to boot those up.

9       But, again, we would be happy to sit down with the  
10      defendants and -- and quickly set up a protocol for doing  
11      that.

12                  THE COURT: Have you sent documents, what you -- did  
13      you --

14                  MR. BROWN: And then in addition, of the documents  
15      that -- that we were seeking, I mean, we would like, you  
16      know, general discovery of documentary evidence relating  
17      to the programming of the machines and so that the -- the  
18      computer scientists can better understand exactly what's  
19      going on.

20                  And we believe that's -- that's reasonable and can be  
21      done expeditiously and -- and may answer many important

22      questions that are -- that Your Honor has indicated are of  
23      interest. And the defendants have not responded to our

24      motion. I'm not sure what their position is on it.

25                  THE COURT: Well, I just got it a couple days ago.

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1 MR. RUSSO: Thank you, Your Honor. I'm Vince Russo  
2 for the Secretary of State.

3 The plaintiffs are essentially asking for unfettered  
4

5 access to voting equipment here in the state of Georgia.

6 The -- we -- the Secretary of State objects to the motion  
7

8 that the plaintiffs have filed in the request. The  
9 plaintiffs, for starters, have not alleged irregularities  
10

11 in each of those precincts where the voting machines they  
12 would like to inspect are located. So, the machines in  
13 those precincts are completely unrelated, as far as we can  
14 tell, to their claims, based on the pleadings at least.

15 Additionally, Your Honor, Mr. -- plaintiffs, one of  
16

17 plaintiff's experts, I suppose, Mr. Demila (phonetic),  
18 even testified -- he even included in his affidavit that's  
19

20 attached to the second motion that the plaintiffs are --  
21 are going to be arguing, but he -- he stated in his  
22

23 affidavit that there's no statistically valid conclusion  
24 that can be drawn from a random sample of -- of machines.

25 Your Honor, at the end of the day here, as my  
26

27 colleagues have pointed out repeatedly, the plaintiffs  
28 have to show that there are enough votes in question, over  
29

30 123,000 votes that -- that call in doubt the result of the  
31 election for valid election contest. The machines that  
32

33 they want to look at are not going to -- they're not going  
34 to have the -- they do not have the votes as far as -- as  
35

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1 far as we can tell and -- and plaintiffs' counsel hasn't  
2 indicated that there were enough votes on those machines  
3 to call in doubt the result of the election.

4 And as such, Your Honor, we think giving them  
5 unfettered access to highly sensitive information about  
6 the state voting machines when irregularities alleged by  
7 the plaintiffs would not change the result of the election  
8 is unnecessary.

9 Additionally, Your Honor, in the filing that the  
10 plaintiffs made to -- excuse me, that the Secretary of  
11 State made this morning, which was regarding the proffer  
12 of evidence, Mr. Demila testified in the -- in the  
13 Totenberg case and the Kerling (phonetic) case that it  
14 would take 14,000 hours to examine all of the machines and  
15 that alone still wouldn't be enough.

16 And for reference, Your Honor, 14,000 hours is more  
17 than a year and a half. While the plaintiffs have -- have  
18 obviously cut down the scope of the -- of the number of  
19 machines they would like to inspect, Your Honor, there's  
20 -- there's still no -- there's still no facts pled that  
21 indicate that the -- the precincts and the machines that  
22 they want to -- that the plaintiffs want to inspect, would  
23 have any effect on the outcome of the election or that  
24 there are any irregularities in those precincts. So, we  
25 would ask that you deny this motion. Thank you.

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1           Oh, I'm sorry. We have not -- we will be filing this  
2 today.  
3

THE COURT: You are.

4           MR. RUSSO: I notice proffer of evidence by Secretary  
5 of State, which includes the transcript that I just

6 referenced from the testimony of their expert in the -- in  
7 the federal case.

8           And I don't know if my colleagues have anything else.

9           MR. TYSON: Your Honor, just briefly on behalf of  
10 Gwinnett County. For Gwinnett, we will do obviously  
11 whatever the Court directs us to do in terms of making  
12 machines available.

13           Our only concern is from a practical perspective.  
14 Obviously, this is voting equipment that is kept in a very

15 sensitive -- and lock and key. We keep these machines  
16 under seal with numbered seals and audit trail to  
17 determine we know who has access to the machines.

18           And we would just want to be absolutely certain that  
19 whatever access is occurring is done in a way in

20 coordination with the Secretary of State's office and  
21 others who are involved with this to make sure that

22 nothing is altered with the machines themselves.

23           Gwinnett owns a mix. We have a mix of machines

24 partially owned by the State and partially owned by the  
25 county, and we will work to determine the specific serial

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1 numbers and who owns those machines. But that -- we are  
2 ready to do whatever the Court directs us to do, but we  
3 just have those security concerns to be sure that nothing  
4 with the machines themselves is being altered and that  
5 there's enough security regarding the -- this inspection  
6 that the plaintiffs are proposing.

7 MR. LINDSEY: Your Honor, if I may be heard briefly.

8 THE COURT: -- is this the original?

9 MR. TYSON: Your Honor, we're going to electronically  
10 file it for --

11 THE COURT: I don't have one given to me. So, this  
12 is mine?

13 MR. TYSON: That's your copy.

14 MR. BELINFANTE: Which I have provided one to  
15 opposing counsel and --

16 THE COURT: Okay. Right here.

17 MR. LINDSEY: Your Honor, if I may be heard very  
18 briefly.

19 THE COURT: Sure.

20 MR. LINDSEY: The petitioner's request, I believe, is  
21 irrelevant to the outcome of this case as you -- based on

22 your ruling regarding our motion to dismiss in which you  
23 made very clear that the -- ultimately, the plaintiffs

24 must show that there were enough irregularities, neither  
25 the votes counted improperly or votes not counted to

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1 amount to 123,000 votes. The petitioner is seeking how

2 many -- how many exact number of -- number of machines?

3 MR. BROWN: You'd have to ask them.

4 MR. LINDSEY: A dozen or so machines? Your Honor,  
5 that's not going to amount to 123,000. Their -- their

6 comeback to our specific numbers that we raise was --  
7 well, we raised a general allegation that system wide

8 there were failures that resulted in the whole election

9 being cast in doubt.

10 If that's their allegation, Your Honor, merely  
11 inspecting a dozen or so machines are not going to prove  
12 or disprove that. And so, for that reason, Your Honor, we  
13 would oppose their motion.

14 THE COURT: (inaudible)

15 MS. BURWELL: On behalf of Fulton County, Your Honor,  
16 their list attached to their motion included counties

17 obviously outside of Fulton County. We don't take a  
18 position with respect to those others.

19 With respect to Fulton County, we would point out to

20 the Court that the complaint only addresses two precincts  
21 in Fulton County where they're alleging there were any

22 irregularities, yet their request for the review of  
23 machines seeks far more than just those two precincts.

24 And so given the limited amount of time, we would

25 request that the Court is going to allow them some leeway

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1   in doing some of this discovery that it not be as far-  
2   reaching as they were requesting and instead that the  
3   Court be very tailored in terms of what they have actually  
4   alleged in getting to the allegations rather than just a  
5   fishing expedition.

6                 THE COURT: (inaudible)  
7                 MR. BROWN: Thank you, Your Honor. First, Your

8                 Honor, we have -- we have alleged irregularities in every  
9                 precinct, not just Grady, not just some other.

10                We've -- our allegations cover a systemic statewide  
11                problem with these electronic voting machine, and we've  
12                only used as illustration some evidence that we have found  
13                in particular precincts here and there, but those are just  
14                illustrations. Our allegations cover every single one.

15                Second, as to the suggestion that this discovery is  
16                unlikely to come up with anything that will allow us to  
17                carry our burden of proof. That's just fundamentally  
18                incorrect. We are also seeking discovery of the GEMS  
19                databases.

20                THE COURT: The who?  
21                MR. BROWN: The GEMS is called -- it's an acronym,  
22                GEMS, which is an acronym for the -- for the servers that  
23                collect the data, and so if there is a flaw in that it's  
24                going to cover more than just the actual machines.

25                THE COURT: -- but that's not what you told me

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1 before.

2 MR. BROWN: Yes. My -- the way I was --  
THE COURT: That wasn't what you said when I came.

3

4 MR. BROWN: Well, the exhibit that I was referencing  
covers DRE machines and also covers the GEMS databases

5

6 that are county specific and these databases cover more --  
I mean, they are not just one by one. In addition, Your

7

8 Honor, but really much more fundamentally is that if there  
9 is a programming --

10 THE COURT: Get back to the GEMS, because I'm not  
11 understanding what you're saying.

12 MR. BROWN: The GEMS database is -- each county has a

13 GEMS --

14 THE COURT: Each county has an individual one.

15 MR. BROWN: Individual one.

16 THE COURT: Okay.

17 MR. BROWN: And then the Secretary of State has a  
18 system that tabulates all of those. And so there could be  
19 a programming flaw anywhere in the system. One of the

20 things that the data -- and this is the public information  
21 that's available that Mr. Lindsey referred to, is that the

22 pattern oddly was found in every single county under votes  
23 for the lieutenant governor's race, which no one had ever

24 seen before historically ever, and it comes up in every  
25 single county.

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1       And so that it is possible, I won't say likely, but

2   possible that there is a single or several programming  
3   mistakes, which have identified, will indicate that

4   there's the system wide failure.

5           But actually, more fundamentally, Your Honor, we'll

6   understand this quickly is that what the defendants are  
7   sort of analogizing this too is if we're hunting for

8   illegal paper ballots, like these cases. As if we're  
9   looking for ballots in which Amico's name was misspelled,  
10   like the Mead case. Or another case in which there's  
11   something wrong with a hard copy of a ballot. And we can  
12   get that ballot and we can count them up and we can count  
13   it up to 124,000 and therefore possibly win.

14           That's not this case. Because those ballots are gone

15   and because of the way the State has chosen to conduct  
16   these elections, that record is lost forever.

17           Instead what we have is the electronic memory and the  
18   programming that drove the way these votes were counted,  
19   we think they were counted wrong. And so, we're entitled  
20   to discovery, we believe, and we think it will be helpful  
21   and not necessarily that burdensome.

22           It's interesting that they now cite to the federal  
23   case for the declaration of Dr. Demila. Indeed, he said

24   if you had to look at every single machine and do a  
25   forensic examination of every single machine it would have

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1 took -- it would take a long time.

2 They haven't done it. We do not plan to do that.  
3 There's not time or resources to do that. Instead, this

4 will be a targeted examination to see if evidence of a  
5 systemic programming error either in the DRE machines

6 themselves or the databases have caused these problems.  
7 Thank you, Your Honor.

8 THE COURT: I have problems with words like "there  
9 could be a flaw" or "there's a possible programming  
10 mistake." And what you're really asking for in this  
11 discovery and fishing expedition, and I'm not going to  
12 give it to you till - left, okay. I am going to -- I am  
13 going to the GEMS are for each county?

14 MR. TYSON: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. RUSSO: Your Honor, the date of the GEMS is

17 public -- is public record --

18 THE COURT: Even if it -- were it --

19 MR. RUSSO: Is highly confidential and the means

20 accessing --

21 THE COURT: Pardon.

22 MR. RUSSO: I said the source code and the means of  
23 accessing the GEMS, of course, is highly confidential, but

24 the data from the GEMS is public record.

25 THE COURT: I am going to allow you to look at the

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1       GEMS in Fulton and in Gwinnett, okay. So -- will have to  
2       access it. He's not to get the confidential access. And  
3       then he can look at. If it's public record, and you can  
4       show him where the public record is, of course you can  
5       look at it, but record and you can show him where the  
6       public record is.

7                   Of course, you can look at all of them, okay. And it  
8       that's up to you all to work out with and I'm going to let  
9       him do it for those two counties because those are the two  
10      counties that are a part of this.

11                  He's got -- the only allegation he's got -- he's got  
12      an allegation in McDonough, he's -- DeKalb and what  
13      county? Because DeKalb's not here. He's got one in Worth  
14      County. He's got Grady High School, -- Library, and then  
15      Allen Temple A.M.E. are the ones that he's alleging were  
16      errors.

17                  And I'm going to let him look at those, okay. It's  
18      got to be supervised by somebody, okay. In the sense of  
19      -- somebody has to watch whatever he supposedly does so  
20      there's no fundamental damage to the system in any way.  
21      Needs to be really clear. Got it?

22                  MR. RUSSO: Your Honor, I mean, we would need to have  
23      some kind of confidentiality order for agreement,  
24      obviously. There's -- when -- when his folks have access  
25      to the machines, we don't -- I mean we can watch what

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1   they're doing. We don't know what they're actually doing  
2   and with the data in the -- the -- the computer  
   technology.  
3

4           THE COURT: -- any sense. You're not -- you're not  
   going to do it yourself --  
5

6           MR. RUSSO: What?  
7           THE COURT: Like I said, if anything on those few  
8   machines, anything is done to damage them in any way,  
9   there will be some absolutely serious ramifications.

10          MR. RUSSO: Okay.

11          THE COURT: And that needs to be fully understood.  
12          MR. RUSSO: Your -- Your Honor, I guess would -- we  
13   would also want just clarification around what it is  
   exactly -- we've mentioned that there's data machines that  
14   we can pull --  
15          THE COURT: (inaudible)

16

17          MR. RUSSO: We can pull the data from the GEMS  
18   machines to give to them. If that's the extent of it,  
   that's one thing.  
19

20          THE COURT: What is it that you want to do on the  
   individual machines?  
21

22          MR. BROWN: We want to examine the internal memory,  
   Your Honor, to determine how the program --  
23

24          THE COURT: How do you examine the internal memory?

25          MR. BROWN: You do -- I -- our -- our experts will be

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1 examining the internal memory to see if there are  
2 programming flaws in the DRE machines that are causing  
3 these problems.

4 THE COURT: I got you. For programming flaws only?  
5 MR. BROWN: Pardon me.

6 THE COURT: For programming flaws.  
7 MR. BROWN: For programming flaws, yes, Your Honor.

8 THE COURT: See if they were programmed wrong, okay.  
9 Simple language, okay.

10 MR. RUSSO: Okay. Not entirely sure what it means  
11 when they get access to what they're looking at.  
12 THE COURT: (inaudible)

13 MR. BROWN: I understand.  
14 THE COURT: That these cases are supposed to be  
15 disposed of fast, and I'm not going to give continuances.  
16 If -- if you would like to work together to do that, if  
17 you run up on a stumbling block, you can always do it by  
18 emails to me and I will email you back.

19 MR. RUSSO: As you said it would be confidential or  
20 not be subject to --  
21 THE COURT: (inaudible)

22 MR. RUSSO: -- because disclosure that's obviously  
23 important for our --

24 THE COURT: Once again your people would have to set  
25 it up, where he can look at it. If he's just looking at

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1 the results of it then, if you know how to show him

2 online, he can get it all in the mistakes, okay.

3 MR. RUSSO: Yeah, we'll be happy to let him see the

4 results of the election.

5 THE COURT: Let him see the results of the state, but

6 at that time --

7 MR. RUSSO: Yes.

8 THE COURT: -- all the counties involved and these

9 five places that he has indicated.

10 MR. RUSSO: Okay.

11 THE COURT: Okay.

12 MR. RUSSO: Thank you.

13 THE COURT: I'll let you submit me the order if you  
14 can agree on that. If you can't, let me know. Like I

15 said, I'm -- the hearing is on the 17 ?  
16 MR. BROWN: Yes.

17 MR. RUSSO: I think, Your Honor.

18 THE COURT: I'm -- I'm here but I sleep occasionally,  
19 but apart from that time --

20 MR. BROWN: Your Honor, let me -- I want to recap  
21 what, Your Honor, has suggested just so we're very clear

22 on -- on this --

23 THE COURT: You want to do it so that you can expand

24 what I just said. Come on, I know that. Is this what you  
25 said, Judge? Yeah. I know that but go ahead.

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1 MR. BROWN: Didn't you say you favored widespread and  
2 far-reaching discovery? No, I'm joking, but --  
THE COURT: Okay.  
3

4 MR. BROWN: Two counties -- limited to two counties?  
THE COURT: Two counties. Gwinnett -- go ahead.  
5

6 MR. BROWN: Gwinnett and Fulton. In the five.  
THE COURT: In the five -- Henry County and  
7

8 McDonough. It doesn't say specifically that one was.  
9 Fulton, Allen County AME -- and Grady High School.

10 MR. BROWN: Okay. Yes, Your Honor.

11 THE COURT: That's what's alleged on the petition.  
MR. BROWN: And that would be examination of the  
12

13 machines under the conditions that you've described. In  
addition, the county servers -- that the county GEMS  
14

15 servers under the instructions that you gave.

THE COURT: -- and if there's a way to get that  
16

17 information if it is public record, then you can get it in  
18 public record.

MR. BROWN: Thank you, Your Honor. At present the  
19

20 trial is scheduled -- for the trial -- not at present.  
th

The trial is scheduled for the 17 --

22 THE COURT: Correct.

MR. BROWN: -- of -- would it make sense to postpone  
23

24 that --

25 THE COURT: No, nothing postponed.

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1 MR. BROWN: Thank you, Your Honor.

2 THE COURT: The rules are -- in fact I'm getting some  
3 pressure as to why this isn't going through faster than

4 it's been. It needs to be done; it needs to be completed;  
5 it needs to be over. I'm not going to move it.

6 MR. BROWN: Thank you, Your Honor.

7 THE COURT: And what I've allowed you to do on those

8 things can be done before that date.

9 MR. BROWN: Thank you, Your Honor.

10 THE COURT: If -- if you put your mind to it. Okay?

11 MR. BROWN: Thank you, Judge.

12 THE COURT: Okay, anything else? You had a motion

13 about -- but I guess that's moot.

14 MR. BROWN: That's moot.

15 THE COURT: Okay, anything else?

16 MR. RUSSO: No, Your Honor.

17 THE COURT: Okay.

18 MR. LINDSEY: Just to move the case along quickly and  
19 I'm going to stipulate to plaintiff's counsel be in

20 agreement -- just taking judicial notice so we don't have  
21 to bring somebody in to show the certified election

22 results of all the statewide elections.

23 THE COURT: Do you have an objection to --

24 MR. RUSSO: I assume we don't have any objections?

25 Just to the numbers. Do you have an objection? No,

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1 Judge.

2 THE COURT: The numbers that he gave me are the  
numbers in the register. Do they have an objection?

3

4 MR. BROWN: No, Your Honor.

5 MR. RUSSO: I just want to make that that's clear.

6

7 THE COURT: Okay. You can put those in without  
having to --

8

9 MR. RUSSO: No, Your Honor.

10 MR. BELINFANTE: We will be doing the same -- we will  
be using the same numbers here on, Your Honor.

11 THE COURT: Okay. That's it.

12 MR. RUSSO: Okay.

13 THE COURT: Anything else? Thank you, gentleman.  
14 MR. RUSSO: Thank you.

15 MR. BELINFANTE: Thank you, Your Honor.

16 MR. TYSON: Thank you, Judge.

17

18 (Whereupon, the hearing was concluded at 10:34 a.m.)

19

20

21

22

23

24

25

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1

## CERTIFICATE

2

STATE OF GEORGIA )

3

4

COUNTY OF DOUGLAS ) SS.  
5

6

I, PRISCILLA GARCIA, A COURT REPORTER IN THE STATE OF

7

8

GEORGIA, DO HEREBY STATE THAT THE FOREGOING IS A TRUE AND

9

ACCURATE TRANSCRIPT AS TRANSCRIBED BY ME AT THE TIME,

10

PLACE, AND THE DATE HEREINBEFORE SET FORTH.

11

I DO FURTHER STATE THAT I AM NEITHER A RELATIVE NOR  
EMPLOYEE NOR ATTORNEY NOR COUNSEL OF ANY OF THE PARTIES TO

12

13

THIS ACTION, AND THAT I AM NEITHER A RELATIVE NOR EMPLOYEE  
OF SUCH ATTORNEY OR COUNSEL, AND THAT I AM NOT FINANCIALLY

14

15

INTERESTED IN THIS ACTION.

16

WITNESS MY HAND IN THE CITY OF DOUGLASSVILLE, COUNTY

17

OF DOUGLAS, STATE OF GEORGIA, ON THIS 18th DAY OF JANUARY

18

2019.

BY:



19

20

PRISCILLA GARCIA, COURT REPORTER  
NOTARY PUBLIC, STATE OF GEORGIA

21

22

COMMISSION NO.: W-00379933

23

COMMISSION EXPIRES: 08/14/2022

24

CERTIFICATION NO.: 5503-2677-8304-9216

25

LICENSE EXPIRES: 04/01/2019

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